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# FIRA AS A REGULATORY PROCESS:
## Lessons for Investment Canada

David Conklin/Jacob Levenstein
assisted by Jayne Sprinthall

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# Contents

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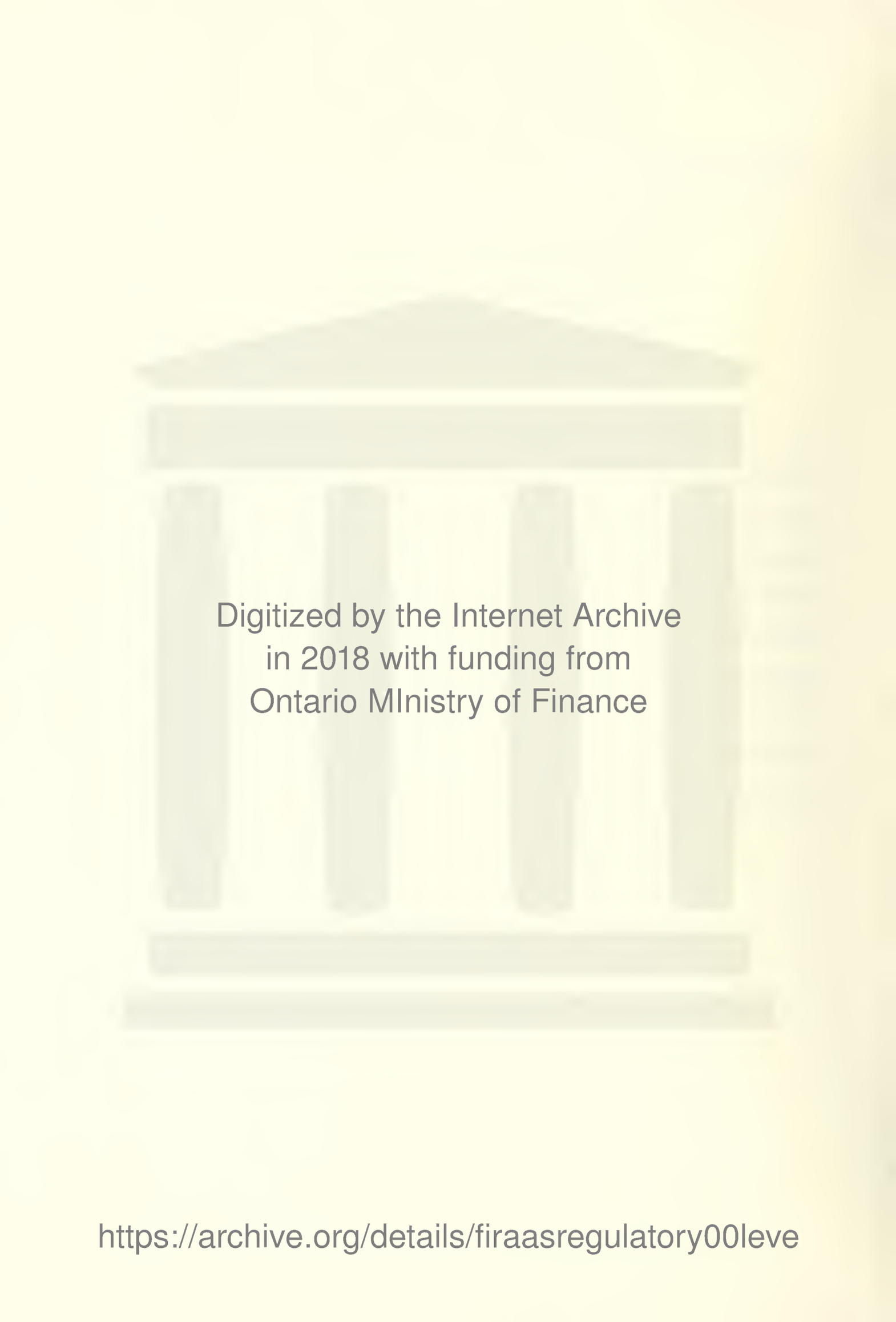

# Summary

This report examines Canada's implementation of its Foreign Investment Review Act (henceforth the Act) which became law on 9 April 1974. The Investment Canada Act which replaced the Act on 2 July 1985 is also examined. The Act created a regulatory process in regard to the acquisition or creation of Canadian businesses by individuals or corporations that are not Canadian. In this regulatory process the Foreign Investment Review Agency (FIRA) has played a central role.

Section 1, the Introduction, discusses arguments for and against control of foreign direct investment (FDI) and presents the mechanics of the process whereby FIRA reviewed applications concerning FDI.

Section 2 summarizes the views of several economists concerning the impact of FIRA. It then reviews data that have been compiled from FIRA's annual reports for the years 1974 to 1985 and reproduced in Appendix 1 of this volume. Several sets of data are examined: FDI into various provinces from the United States, western Europe, and other nations; FDI into types of business sectors, by area of origin; and FDI into particular types of manufacturing activities. Some data from other sources are also examined. The most striking conclusion from this analysis is the difficulty in pinpointing what changes FIRA has caused. We can find no clear evidence from this data on FIRA's activities that the existence of FIRA has influenced the decisions by foreigners to invest in Canada, in particular provinces, or in specific business sectors.

Quite apart from the ambiguity concerning the impact of FIRA, there is a lack of clarity concerning the criteria for FIRA's decisions which leads us to consider in section 3 the fairness of the FIRA process from the perspective of the individual persons and corporations that may be affected by it. The ad hoc nature of FIRA's decisions is emphasized. A series of criticisms is presented, centring on the lack of consistency in the decision-making process: similar applications may not have received similar treatment; the public was not provided with information concerning the way in which FIRA's criteria should have been interpreted and was not provided with precedents other than a sample of undertakings from a sample of accepted applications; little public evidence exists of the degree to which under-takings negotiated with successful applicants are enforced.

Section 4 considers legal and parliamentary aspects of the FIRA process. Members of Parliament – like members of the general public or like prospective foreign applicants – were given only limited information concerning FIRA's criteria or the rationale for particular decisions. Closely related with this point is the fact that the whole tenor of FIRA could have changed overnight – and did so change – without any reference to Parliament or any alteration in the Act. Further, justice entails equal treatment of people in equal circumstances and 'due process' to ensure this. The possibility is also raised that FIRA may have violated the Canadian Charter of Rights and Freedoms and/or recently established principles of administrative law.

Section 5 focuses on alternative methods of regulating FDI. We examine in turn the 'open door' policy advocated by Ronald Wonnacott; a universal tax on foreign investment, also suggested by Wonnacott; and the ownership rule used by Australia in the mining sector. Existing Canadian legislation dealing with specific economic sectors is outlined in Appendix 2. Some have suggested proposals that would require amendments to the Act; in particular, the 1980 Speech from the Throne advocated three alternatives in regard to: the publicizing of major foreign acquisition proposals

prior to FIRA's review of the proposals; the provision of financial assistance to Canadian companies wishing to repatriate assets or to bid on firms subject to foreign takeover offers; and the use of performance reviews to see how large foreign firms are meeting the test of bringing substantial benefit to Canada. The disadvantages and difficulties of each of these are considered, as well as their intended beneficial effects.

Reference is made in Section 5 to the brief of the Canadian Bar Association which was submitted to Herb Gray on 24 September 1981. Appendix 3 contains a selection of Herb Gray's responses to the many criticisms and suggestions contained in this brief. We have included this material since, for the most part, Mr. Gray's answers are a strong defence against the CBA's criticisms of FIRA.

Section 6 is a description of the Investment Canada Act and a discussion as to the extent that this new act is significantly different from the old act.

Section 7, the Conclusion, emphasizes the need for more information than is currently available in order to evaluate FIRA and possible modifications or alternatives to it.

To what degree can the desire to achieve clarity, fairness, and justice be balanced against the desire to promote Canadianism? To what extent is a process like FIRA necessary in spite of its possible violation of these basic objectives? The Conclusion argues that more information concerning FIRA would assist in answering these questions.

Even though the FIR Act has been replaced by the Investment Canada Act, we feel that our examination of FIRA is still relevant. First, it is possible that Canada's political leaders may, in the future, seek to more strongly regulate FDI once again or to modify the current Investment Canada Act. if so, the issues raised here could provide some guidance in regard to their choice of modifications. Second, some aspects of FIRA may exist in other regulatory processes and, to this extent, the

following comments may be helpful in considering other areas of government intervention in the economy.

# 1
# Introduction

The Foreign Investment Review Act (the Act) had the potential to change foreign direct investment (FDI) in Canada in many different ways, by altering, for example, the volume of FDI, the sectors to which it flows, and the guidelines under which foreign firms conducted their business in Canada. Canadian and foreign firms alike were also potentially affected in terms of their ability to offer competitive bids for acquisitions. Canadian firms and Canadian shareholders may have found that potential foreign purchasers of their shares or assets were excluded by FIRA, thereby reducing their opportunities to sell such shares or assets and, consequently, reducing the market value of these shares or assets. From an analysis of FIRA's published data, we can find no clear impact on the volume and pattern of foreign investment.

There has been much examination of the pros and cons of regulating foreign investment in Canada. This report does not attempt to add to the debate over whether Canada will be better off in terms of income, growth, and employment now that FIRA has been replaced. Instead, we summarize the debate with some brief comments and then examine FIRA as a regulatory process.

Given the premise that FDI should be controlled, we recognize that economists are limited in the extent to which they can advocate particular changes. This is so since FIRA's goals were political as well as purely economic in nature and because the administration of the Act had been primarily a political process, in which efficiency and consistency, traditional areas of concern for economists, were of relatively minor importance. The manner in which FIRA was established and was administered

emphasized the central role of politics in the decisions regarding foreign investment. The establishment of IC and the reactions to it further indicates the role of politics. IC's potential to influence the investment environment by political actors in our system as time passes and as out political and social mosaic is transformed in unpredictable ways, do indicate a role for economic analysis for FIRA. This is especially so since we feel that IC may not be as different from FIRA as is commonly believed and may be easily converted into a regulatory body even more similar to FIRA than it is now. Economic tools are useful for pointing to inefficiencies and inconsistencies and emphasizing the economic costs of these inefficiencies even if non-economic arguments prevail in the decision-making process. Given the desire to regulate FDI, economists can contribute to the debate by analysing alternative regulatory methods which may involve fewer distortions and inefficiencies than the present method. Our report is presented in this context, outlining and analysing the different alternatives in a manner that, we hope, clarifies the issues and facilitates the development of positions.

## THE RELATIONSHIPS BETWEEN TRADE, INDUSTRIAL STRUCTURE AND FDI

An analysis of FDI should include a consideration of the relationship between Canada's tariffs and the structure of Canadian industry, including both production costs and the role of foreign subsidiaries. In the past, high tariffs may have motivated foreign corporations to increase FDI in Canada as a way of selling products in the Canadian market without having to face the tariff. Recent tariff reductions, however, may have altered this situation.

Harris and Cox (1983, p. 7) examine the view of some economists who believe that protection imposes high costs on the Canadian economy. Many Canadian factories (and especially those factories owned by MNCs) sell primarily in the domestic market. Their size and profitability is affected by the tariff barrier. Since the Cana-

dian market is smaller than the US market, this results in Canadian plants having smaller production runs. These smaller runs result in higher costs (per unit of output) and may be responsible for the 'approximately one-third to one-quarter gap between American and Canadian productivity' (Harris and Cox, 1983, pp. 6-7). The authors contend that:

> if free trade were to be established, Canadian plants would specialize and produce for the world market as opposed to the much smaller domestic market. Consumers would replace some high-priced, Canadian-produced goods which would no longer be produced domestically with cheaper foreign substitutes.

As consumers we would benefit from the lower costs of free trade. However, we remind the reader of Rotstein's (1984) concerns about the harmful effects, on the Canadian economy and especially on the level of unemployment, of MNCs leaving Canada for 'countries offering lower wage rates, lower taxes and higher productivity' (pp. 55-6).

Any decisions on the future of IC and FDI policies, then, must take into account the possibility that, with tariff changes, not only MNCs but even some Canadian firms may alter the size of their Canadian manufacturing facilities relative to their plants elsewhere in the world. We must also take into account that the process of trade liberalization will continue at least until 1987, at which time Canada is to fulfil the last of its commitments under the recently negotiated GATT agreement on tariff reductions. Crookell (1983, p. 22) states:

> the Tokyo Round tariff cuts ... by 1987 will result in a 40 per cent decline in most secondary industry import tariffs ... For US investors, a 40 per cent decline in Canadian import tariffs is in effect an invitation to consider withdrawing Canadian production and serving the Canadian market from US output.

## MULTINATIONALS AND GLOBAL PRODUCT MANDATING

The document entitled *The Report of the Advisory Committee on Global Product Mandating* (pp. 7-9), prepared in December 1980 for the Ontario Ministry of Industry and Tourism argues for a more positive attitude towards FDI, encouraging global product mandates as a means of increasing the benefits Canada receives from FDI:

> Governments can influence more multinationals to evolve to specialized missions in their Canadian operations. They can also contribute to the ability of affiliates to compete for attractive specialized missions. The most effective way to achieve these objectives is to emphasize performance rather than ownership of the multinational affiliate.
>
> Most multinational affiliates are responsive to the stated objectives and policies of the governments of the host countries in which they operate. Explicit and consistent government commitments to encourage and facilitate the development of specialized missions can be extremely positive in helping the affiliate's business case. Non-existent, inconsistent or apparently hostile policies can be a disadvantage to the managers of affiliates as they compete for specialized missions. For example, government policies or statements calling for greater Canadian ownership and possible nationalization without regard to performance are understandably a serious deterrent to further investment in Canada. Rather than moving to specialized missions, which almost always involve greater dependence on the Canadian affiliate for successful world-wide operations, the temptation would be to supply the Canadian market from other countries ...
>
> Governments must concern themselves with the overall Canadian business climate and with measures to provide incentives to manufacturers attempting to establish world-competitive operations in Canada. These measures should apply to all firms, and should not discriminate against foreign-owned multinational affiliates ...
>
> Government incentive programs such as investment tax credits and industrial development grants have proven useful in earning and maintaining specialized missions. Such programs should continue to be

available to all firms regardless of their ownership, where their performance contributes to the achievement of Canadian industrial objectives.

Strong economic arguments exist for treating all firms in the same manner, whether they are owned by foreigners or by Canadians. For example, some economists feel that a business in Canada will be operated in the same manner whether it is owned by a Canadian or by a non-Canadian. The goal of profit-maximization will ensure this. Even if the non-Canadian is maximizing the joint profits of a Canadian and US operation, the Canadian business will not be run differently. Also, it is equally likely that transfer-pricing will be used as a means of income tax evasion even if the business were to be run by a Canadian. The Canadian could incorporate a company abroad and sell the output of his Canadian business at a price below the market price and thus, illegally, reduce his Canadian tax liability.

Canada's current need for modern technology, which may best be transferred by FDI, makes this an especially inappropriate time to be restricting foreign investment. Difficulties of administering FIRA in a fair and just manner may have contributed to the position that FIRA should be abolished. If IC is only a modified version of FIRA then the reader may wish to consider whether IC should be abolished. The answer to this question is left with the reader, together with the recognition that one's answer may depend largely on one's political philosophy.

## WHY CONTROL FOREIGN DIRECT INVESTMENT?

Before dealing with the nature of FIRA itself we would like to indicate briefly some views of those who advocate and of those who oppose the control of foreign direct investment in Canada. Views on this issue have been presented by hundreds, if not thousands, of observers and have formed the basis for a great deal of debate within Canada over many years.

Much of the argument criticizing foreign investment has been summarized in a recent book published by the Science Council of Canada, *The Weakest Link: A Technological Perspective of Canadian Industrial Underdevelopment* (1978, pp. 87, 92-5), by Jonah N.H. Britton and James M. Gilmour. The authors argue that in Canada, FDI is not generating development in the sense of innovation and technological progress; it is only perpetuating established production patterns. A nation's development potential is affected by the degree to which it depends on other nations for materials, ideas, and capital; FDI increases this dependence because of the close links between foreign subsidiaries in Canada and their parent companies. This dependence has been a major reason for the fact that natural resources form such a large share of Canada's total exports, while manufactured goods form only a small share. The basic purpose of FDI is to protect the market for the foreign parent company, not to create jobs or development. This has meant that an excessive number of firms within the Canadian market has reduced the size of production runs, with a concommitant increase in costs and reduction in productivity. Foreign-owned plants are too diversified, being miniature replicas of the parent. This has prevented Canadian manufacturing from becoming internationally competitive. Further, foreign-owned firms have tended to concentrate their facilities in particular regions, with the result that they have widened regional economic disparities.

Britton and Gilmour also discuss the phenomenon of the truncated firm. A truncated firm does not carry out all the functions – from the original research required through to all the aspects of marketing – necessary for developing, producing, and marketing its goods. One or more of these functions are carried out by the foreign parent of the Canadian firms (p. 96). The authors quote extensively (pp. 96-7) from the 1972 Gray Report, *Foreign Direct Investment in Canada*, on this issue:

> Depending on which activities are involved, truncation may mean less production for the Canadian market, less opportunity for innovation and entrepreneurship, fewer export sales, fewer supporting services, less training of Canadian personnel in various skills, less specialized product development [aimed] at Canadian needs or tastes and less spillover economic activity and so on ... At best, component manufacture is likely to be shipped to Canada only for more mature products and only then if Canada is a more attractive location for production than other countries – including the 'low wage countries'.

Britton and Gilmour conclude their section on the Gray Report by accusing the critics of the report of having

> failed to grasp the essential structure of a truncated medium/high-technology industry in Canada. Once the implications of truncation are grasped, it is hard to believe that anyone would be so naive as to regard foreign-controlled and domestically-controlled firms as comparable industrial units (p. 97).

In response to Britton and Gilmour's study, K.S. Palda published *The Science Council's Weakest Link: A Critique of the Science Council's Technocratic Industrial Strategy for Canada.* In this book, Palda examines the contentions of Britton and Gilmour and suggests that the evidence does not support their arguments. Concerning the key issue of technological progress, Palda claims that, in fact, 'foreign-owned firms actually spend more on R&D than Canadian-owned firms' (pp. x-xi). Criticisms have also been raised by Donald J. Daly in an article reviewing the Science Council book, entitled 'Weak Links in the Weakest Link'.

It has been suggested that the successful R&D performance of some Canadian corporations has been due not to their Canadian ownership but rather to the receipt of government subsidies. One source for this view is Steven Globerman's study 'Market structure and R and D in Canadian manufacturing industries' (1973). A more recent study by J.A. Alexander (1983) reaches the same conclusion. However,

Alexander thinks that her results may be due to a problem with the statistical design of the study: 'A simultaneous equation model could be developed in which R and D and profitability are jointly determined by variables such as foreign control, concentration, grants, size, and so on' (pp. 33-4). In other words, improved statistical techniques could, possibly, provide clearer evidence as to which factors determine a Canadian firm's level of R&D spending.

The question of whether the foreign ownership of a firm affects the amount of its R&D spending is, to at least some researchers, one of the most important questions relating to the general issue of the impact of FDI on the Canadian economy.

Abraham Rotstein, in his book *Rebuilding from Within* (1984), argues that multinational corporations (henceforth MNCs) have distorting effects on the Canadian economy. Some of these effects are:

> the relatively low level of research and development performed in the host country, since R&D tends to be centralized in the home country ... the problem of inefficient small-scale production – the miniature replica effect ... the extra-territorial control of the sales of MNCs by the US government (as in the recent case of the Soviet pipeline). (p. 55)

Rotstein adds: 'It is well known that the prices Canadian subsidiaries pay for goods and services purchased from their parent companies or from their affiliates can be manipulated to reduce their corporation income tax obligations in Canada' (p. 57).

R&D is of particular interest not only to Rotstein, but to those who run FIRA. Anecdotal evidence indicates that an undertaking in an application to the Agency to do R&D in Canada is regarded quite favourably.

The low level of R&D in Canada is depicted in Rotstein's book in his Figure 3-1, 'Domestic R&D expenditures as a percentage of gross domestic product' (p. 42). This graph shows the R&D:GDP ratio relatively constant from 1968 to 1972. It then fell from 1972 to 1974 and levelled out again from around 1974 to 1980, the final year

displayed on the graph. For comparison purposes, Rotstein shows the R&D:GDP ratios for fourteen other countries over the same period. Canada's R&D spending compares favourably with that of only Spain, Italy, Denmark, and Ireland.

However, the relevance of such comparisons is suspect. We do not know, for example, whether Denmark's method of measuring R&D spending is the same as Canada's, or whether it is even the same measure from year to year. We also do not know if a change in any one country's ratio over time reflects a change in the numerator, R&D spending, or the denominator, GDP.

Rotstein makes a prediction: 'The problems that Canadians face over the coming decade, however, have taken a substantially different turn. Multinationals generally are shifting production into Southeast Asia and into countries offering lower wage rates, lower taxes and higher productivity' (p. 55). As a result,

> the major problem of the coming decade is not that of the conditions of entry of multinationals but that of their prospective exodus from Canada. This will become a particularly cogent problem as Canada's recent agreement of tariff reductions falls into place after 1987. If the Canadian market can be served more cheaply from abroad and tariff barriers are lowered or eliminated, there is little reason for existing multinationals to stay and even less incentive for new MNCs to enter (pp. 55-6).

Rotstein is sympathetic to the goal of controlling FDI, especially that of MNCs. He has contributed much to the discussion of the role of MNCs in Canada. His view seems to be that one policy goal may soon be keeping the MNCs from leaving Canada, rather than keeping them from entering. However, if we have had problems with the MNCs here, why should we worry now that they are about to leave? Is there some optimum value for FDI or of foreign ownership of our capital stock such that our policy should prevent movement away from these target levels in either direction?

Or does Rotstein's argument suggest that the Foreign Investment Review Act is now at best irrelevant or at worst harmful?

Rotstein suggests that large numbers of MNCs may decide to close down their Canadian operations, manufacture abroad, and import into Canada. If so, then we may be facing a significant rise in unemployment. The argument can therefore be made that the movement to freer trade may require a policy that foreign firms that wish to sell in the Canadian market must produce some proportion of their product here. We will need a policy that is the exact opposite of FIRA, i.e., a policy requiring foreign direct investment.

We would like to raise an additional issue. One result of the Act may be to strengthen the control of Canadian businesses in the hands of the existing management. In the United States we have seen the growth of a phenomenon called the leveraged buy-out (LBO). In an LBO one company is able to buy a controlling interest in the shares of another using funds of which as much as 90 per cent might be borrowed. The shares of the acquired company are used as collateral. FIRA's existence may have prevented some LBOs of Canadian-owned firms by US firms. This may have been a highly valued side-effect of the Act, at least for some corporate executives who do not wish to see their firms taken over in an unfriendly manner. The smaller, minority shareholders who have no real control over their company could, however, benefit from an unrestricted opportunity to sell their shares in a takeover, unfriendly or not. Increasing the likelihood of takeovers of Canadian companies by foreign companies would thus make owning Canadian common shares more attractive to small investors both in Canada and abroad. If one believes that our economy needs less debt and more equity in financing its capital stock, then this consideration could be important. Canadians will have to consider the possible costs to our economy of lower stock prices and higher debt/equity ratios in evaluating the net effects of FIRA.

*The free market approach*

There is a view among some economists that the free market is the optimal allocator of capital and that foreign direct investment should not be controlled. Globerman (1979) presents the following arguments (pp. 37, 72):

> Technological change – particularly improvements in product quality – associated with foreign direct investment may, on average, proceed at a faster rate than that associated with domestic investment. Furthermore, foreign direct investment may facilitate the capture of economies of scale if foreigners can more efficiently manage firms of larger average size. Some evidence – although largely indirect – is available to support these assertions ...
>
> A plausible general interpretation of why foreign buyers can outbid Canadian firms for specific domestic assets is that foreign firms can utilize the purchased assets more productively than can potential Canadian buyers ... If superior efficiency is the underlying motive for most foreign acquisitions of domestic assets (and if foreigners ordinarily pay up to their maximum price for domestic assets, as suggested above), it is not likely that Canada's economic interests would be served by discouraging such acquisitions. Indeed, if the derived or 'spillover' effects of foreign acquisitions include lower prices for consumers and/or increased productivity in domestically owned firms, restrictions on foreign direct investment will impart economic costs to the Canadian economy.

Thus, Globerman feels that Canadians, as consumers and as investors, suffer a loss of income and of welfare to the extent that FDI is restricted in Canada.

## FOREIGN INVESTMENT REVIEW

*The Act*

The Foreign Investment Review Act – S.C. 1973-4 c.46 (amended S.C. 1976-7 c.52) – was proclaimed into force in two phases. Phase I, effective 9 April 1974, directed

FIRA to review all takeovers of Canadian businesses by foreign firms, including indirect acquisitions. Phase II, effective 15 October 1975, extended FIRA's scope to cover all new foreign direct investment as well as any expansions by existing foreign-controlled firms into unrelated business activities.

The minister of industry, trade, and commerce was designated the minister responsible for the Act. He in turn appointed a commissioner to administer the Agency. FIRA carried out a confidential review of each investment application to determine if the proposed investment will be 'of significant benefit' to Canada and advised the minister on the outcome of the review. The minister in turn made a recommendation to the cabinet. Despite the high profile of FIRA and its commissioner, the cabinet alone was empowered to make all regulations based on the Act and had the power to approve or block individual investments. The decision of whether or not to allow each investment was to be made through a political process, reflecting Parliament's belief that this issue is basically political rather than legal, economic, or administrative.

*The Agency and the review process*

The Act itself did not apply to purchases of shares or other securities of Canadian companies not involving acquisition of control of the companies concerned; investments to expand foreign-controlled businesses in Canada; the establishment of new businesses in Canada related to an investor's existing business in Canada; or the acquisition of control of a Canadian business with gross assets less than $250,000 and gross revenues less than $3 million by a person already carrying on in Canada a business related to the one acquired (FIRA *Businessman's Guide*, pp. 10-11).

A simplified procedure introduced March 1977 covered acquisition of a business with gross assets less than $5 million (increased from $2 million, June 1982) and fewer than 200 employees (increased from 100, June 1982). It was also available for

the establishment of a new business if at the end of the second year of operation the new business was to have had gross assets of less than $5 million and fewer than 200 employees. Less information was required with this simplified procedure. Originally there was a provision – since removed – for 'bumping' a small business from the simplified procedure into the normal procedure. As a result, about one-half of all applications were dealt with under the simplified procedure. This takes only days or a few weeks and does not involve the same calculations of 'significant benefit' (Schultz et al, p. 60).

A special committee of the Privy Council, made up of members of the cabinet, dealt with the Agency's recommendations as presented by the minister responsible, and it passed orders-in-council for approved cases. Further administrative changes announced in June 1982 allowed 'bumping' only if the application appeared to raise important policy issues.

For applicants that must follow the normal procedure, FIRA prepared extremely detailed analyses, based on consultations with federal departments, provincial ministries, representatives of the firms involved, and other interested parties, and focused on 'significant benefit.'

The factors involved in assessing 'significant benefit to Canada' are laid out in section 2(2) of the Act:

> (a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;
> (b) the degree and significance of participation by Canadians in the business enterprise or new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;

(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and
(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

Each year FIRA had published an annual review. In the reviews it listed ten categories of benefits, based on the criteria listed above, and listed the categories in which each particular investment proposal is expected to provide significant benefit to Canada. These categories were: increased employment; new investment; increased resource processing or use of Canadian parts and services; additional exports; Canadian participation (as shareholders/directors/managers); improved productivity and industrial efficiency; enhanced technological development; improved product variety and innovation; beneficial impact on competition; and compatibility with industrial and economic policies. The analyses compiled by FIRA were based on this approach.

In addition to examining investment proposals and soliciting opinions from other government departments, FIRA also took an active role in negotiating with applicants in order to improve the benefits Canada will receive from their proposals. The negotiation procedure was sometimes lengthy and may have involved any element of the business' operations. The above list of benefits seems to have formed the agenda for the negotiations. The evaluation of each proposal included any undertakings to which the applicant had agreed. The Act provided for the obtaining of court orders to enforce undertakings; it also provided for the citing and punishment of those who fail to obey such court orders.

In theory there was a 60-day limit on each review (section 13 of the Act). Unless the application had been disallowed by the cabinet it was automatically allowed if this time limit was reached. However, the minister could at any time stop the review process, if, for example, he or she felt an application did not contain adequate information (section 11). Once the review process had been stopped there was no limit as to how long it may have taken to complete the evaluation (Schultz et al, pp. 63-5).

The completed FIRA analysis was prepared in the form of a memorandum to the cabinet. The minister presented the memorandum to the Economic Development Committee of the cabinet, where it apparently was discussed and evaluated. A decision was made by this committee, and the analysis then went to the full cabinet, which may have quickly approved the committee's decision or discussed the proposal in detail. The ultimate judgment was in the hands of the cabinet. Usually any differences of opinion between departments appears to have been resolved before the analysis was sent to the cabinet. The resolution of such differences may have involved further negotiations and undertakings with the applicant.

Many analysts have studied the manner in which the Act was administered in order to determine what effect, if any, the existence of FIRA had on the level and/or quality of foreign investment. Section 2 will review the positions some economists have taken in regard to FIRA and foreign investment regulation; we will look at data 1974-85 from FIRA annual reviews to see if FIRA had a discernible impact on FDI. A discussion of the fairness of the FIRA process and its adherence to principles of justice follows in sections 3 and 4 respectively. Possible alternative methods of regulation will be presented in section 5, and section 7 will discuss conclusions we have drawn from this examination of FIRA as a regulatory process.

# 2
# Impact

If a democratic government adopts a policy that could potentially alter economic activity in a significant manner, then it should be possible for that government, and for outside observers, to ascertain and evaluate the impact of that policy. Such a policy is undesirable to the extent that its impact cannot be ascertained and evaluated. In discussing FIRA's effect on foreign investment patterns, we will look first at the positions of some economists who have studied this question. We will next examine statistical tables constructed from FIRA's annual reports, in order to ascertain whether foreign investment patterns were altered as a result of the operation of FIRA.

## ECONOMISTS ON FIRA

The question of FIRA's impact has attracted the attention of many economists who would like to quantify the impact on the economy of Canada's regulation of foreign investment. These analysts would like to be able to state definitely that FIRA has had a negative impact, no impact, or insufficient impact. Those who would assert that FIRA did not have any major effect on FDI look first to FIRA's record of approval of applications: 81 per cent of all applications from 1974 to June 1982 were approved. The recent trend is much higher than this average: 'Since the Foreign Investment Review Agency "streamlined" its operations in 1982, approval rates have risen to a

point where they can't go much higher. Ninety-seven per cent was the rate in 1983' (*The Public Sector*, p. 1).

However, looking simply at the approval rate does not shed much light on the quality of FIRA's influence on FDI. For example, as many critics have pointed out, FIRA's high approval rate is an inadequate statistic; it does not reflect investment decisions that had gone unmade because of FIRA's presence or applications withdrawn after the potential investors learned of FIRA's requirements; and it tells us nothing about dollar volumes of approved or rejected applications. Also, the acceptance rate for larger investments may, for example, be higher than for smaller investments. We are thus reduced to dealing in 'what ifs?'; what would the foreign investment patterns have looked like if FIRA did not exist? In the literature this difficult question seems to have been overlooked in favour of conclusions drawn from post-1974 data on investment patterns.

In an article written soon after FIRA's review operations had begun in 1974/75, Alan M. Rugman stated that data from the first two years of reviewing takeover proposals suggested that 'FIRA is willing to approve the great majority of takeovers and is indeed something of a "paper tiger" in terms of its record' (Rugman, 1977, p. 323). In a 1983 update, however, he cast doubt on his earlier findings by citing figures that showed that FIRA's rejection rate for new business investment had doubled in 1980/81 and that there was a 'dramatic increase in the rejection rate for takeovers', both of which 'confirms suspicions of the more interventionist role of FIRA' (Rugman, 1983, p. 353). Rugman's explanation for the jump was that the administration of the Act was tightened in 1980/81. Rugman did recognize the difficulty in evaluating the effect of FIRA when he noted: 'When the climate for foreign investment becomes more hostile some investors will not even apply to FIRA. There is no way of calculating these potential losses to Canada' (ibid.).

A recent study by Duncan McDowall (1984) published by the Conference Board of Canada, *A Fit Place for Foreign Investment?: Foreign Investors' Perceptions of Canada in a Changing World*, surveyed both actual and potential foreign investors in an attempt to identify factors that either attracted or deterred investors in deciding on projects in Canada. The survey attempted, in the words of the author, to reach

> not just ... investors with a proven interest in Canadian investment but also those who had considered Canada but had never proceeded with their investment plans. The questionnaire was mailed during June and July 1983, to a sample group of companies structured to reflect the overall historical patterns of investment flowing into Canada, according to nation of origin and primary economic activity (McDowall, p. 1).

The survey focused on investors' views of Canada over the last ten years and found that most potential investors consider Canada to have an attractive investment climate. However, the study also found that 'a minority of potential investors, 11 per cent of the respondents [31 firms of 278], ... stated that they had been deterred from investing in Canada by the existence of various forms of foreign investment controls' (p. ix). Further, 'Those companies and individuals citing government regulation and foreign investment controls as the "most important" factor in the analysis of their Canadian investment prospects formed a small but vocal minority ... FIRA was criticized for the principles underlying it and for its bureaucratic operation' (p. x).

The study's conclusions were based on a relatively small sample that included some companies with either only one or few employees. The subset of respondents deterred by government regulation and foreign investment controls was very small (31 companies) (p. 65). The results of the study must thus be accepted with caution. However, it is significant because it attempted to identify factors discouraging investment in Canada.

A different view about FIRA is advanced by Abraham Rotstein (1984). In section 1 we discussed Rotstein's concern that MNCs have distorting effects on the Canadian economy. Because of these distortions Rotstein is sympathetic to regulation of FDI in Canada. However, he thinks: 'The underlying Canadian approach ... has been an emphasis on screening. This policy is presently being implemented in very weak form by the Foreign Investment Review Agency' (Rotstein, p. 55).

Rotstein feels that the government has not done enough to ensure that Canada's principal bargaining chip – a rich market of 25 million people – both attracts and holds the multinationals in Canada (p. 56). He suggests (p. 61) that because of the ease with which MNCs can pick up and leave, Canada should get at least the short-term benefits that would result from imposing performance requirements on the subsidiaries of multinationals operating in Canada and the collection of its proper tax revenues from the MNCs (i.e., from the implementation of a unitary tax formula where possible).

In the final issue of *Foreign Investment Review* (a journal published by FIRA from 1977 to 1982) Herbert Byleveld, then an analyst at the Department of Regional and Industrial Expansion (DRIE), stated about foreign investment flows in the 1970s and 1980s: 'It is the nature of the long-term capital inflow that has changed rather than the total volume' (Byleveld, p. 16). Byleveld makes a distinction between foreign direct investment and inflows of portfolio capital and argues that both types of foreign investment must be considered if one is to see 'a different and more complete picture' (p. 15). When the short-term capital inflows are included to balance the reported decline in long-term capital inflows, there has clearly been 'a significant increase in the total net foreign capital inflow' (p. 16). This increase has occurred, by implication, despite FIRA's existence.

However, Steven Globerman, in his 1979 study, US *Ownership of Firms in Canada*, argues that foreign direct investment and portfolio investment are not perfect substitutes for each other:

> To the extent that direct investment is, on average, a more efficient way of transferring resources under certain circumstances, alternative forms of foreign investment will not be perfect substitutes. Thus restrictions on foreign direct investment could be expected to reduce overall foreign investment in those activities where arms-length exchange is less efficient than intracorporate exchange (p.22).

Globerman states carefully his conclusions about the economic impact of FIRA's activities. His evidence seems to suggest that FIRA reduced the long-run foreign demand for Canadian assets by raising the cost of these assets to foreigners. The increased cost to foreigners was due to the undertakings to which the foreign investor had to commit himself but to which a Canadian investor did not. Although Globerman admits (pp. 84-5) that there is no 'definitive evidence that FIRA has imposed net long-run costs on either the Canadian or the US economies ... the evidence tends to suggest that the review process reduces, rather than increases, the potential income benefits of foreign direct investment to both countries'. The corresponding increase in portfolio investment noted by Byleveld does not, in this view, act as much of a counterbalance against the costs to Canadians resulting from lower levels of FDI. Globerman concludes that his 'abbreviated consideration of the potential direct and indirect effects of FIRA suggests that, at a minimum, the potential effects are far more complex than has to date been acknowledged in policy analyses' (p. 79).

## FIRA'S DATA

Do the publicly available data on FIRA's operation lend support to any of the various conclusions surrounding the impact of FIRA? It is our contention not only that the potential effects of FIRA are complex, but also that the data from FIRA's annual reports fall short of what would be needed to provide the basis for any solid analysis of FIRA's impact on foreign investment patterns in Canada.

We will present this data, found in Appendix 1, from three perspectives: foreign investment flows into Canada from the United States, western Europe, and elewhere; the type of business sector to which FDI has been directed, by the same areas of origin as above; within the manufacturing sector, by the particular type of manufacturing activity to which FDI has been directed. Data have been compiled in terms of both the acquisition of existing Canadian-owned firms and the creation of new businesses. Tables have been compiled for the number of applications as well as for the dollar value of the assets involved. Our focus is the period 9 April 1974–31 March 1983.

### *Examination of the data*

One of most striking features of the tables discussed here is the general lack of variation over the 1974-85 period in the dollar value of 'Reviewable manufacturing acquisition cases'. Investment spending is often the most unstable component of gross national product. It is therefore significant that this measure of foreign direct investment in Canada was so stable over the period covered. It may be that changes in spending plans by foreigners in Canada are better explained by changes in economic activity abroad, than by the activities of FIRA. One might have expected that, if domestic investment spending is so unstable, foreign demand for Canadian capital investments would be even more unstable.

The first reaction to these data is that FIRA may have had no impact. However, this is not the necessary conclusion. It even is theoretically possible that during the years covered, foreign take-overs in manufacturing would have been extremely unstable and that FIRA actually smoothed out the year-to-year fluctuations that would have occurred in its absence. In addition, even if we had data to enable us to compare the pre-1974 and post-1974 periods we could not prove that FIRA had or did not have any effect. What we need is an objectively determined statistical measure of the aggressiveness of FIRA – something that we do not have. We must be able to show that FIRA tried to be either restrictive or lenient during a particular year and that some measure of FDI either fell or increased, after allowing for all other variables that might affect FDI.

Let us now examine the data. Table 1 looks at the origin and destination of investment flows into Canada for purposes of acquisition. We can see that, for each year, between 58 and 71 per cent of all applications for acquisitions came from the United States, between 27 and 35 per cent from western Europe, and between 2 and 8 per cent from other areas. For each investment source the destinations of investment flows have also been relatively unchanged. A majority of the investments in the western provinces were directed primarily into Alberta. (We have put the western provinces together in one classification because it gives a better comparison to the investment going into Ontario and Quebec). The only exception to the otherwise unchanged destination pattern may be a tendency over the 1977-80 period for non-US foreign investors to be less interested in Quebec. This measure of American investment in Quebec, in contrast, continued to be weak until 1983-4. Concern by foreign investors over possible Quebec separation appears to be one possible cause for a change in the acquisition applications, by area of origin or destination, over the years 1974-83.

In Table 2, which lists the value of assets involved in reviewable acquisition cases according to the applicants' region of residence, a similar stability in the percentages figure is apparent at least until 1981/82, with the exception of 1978/79. In that year US acquisition cases fell to 55 per cent, on the basis of assets, and western European acquisition cases rose to 43 per cent. In 1981/82 the percentage-of-assets figure for all other countries begins to increase. The FIRA annual report often does not break down the figure on a country-by-country basis in order to 'preserve confidentiality.' We therefore do not always know which countries are the sources of this increase in demand for direct investment in Canada.

Table 3 shows the destination of and amounts involved in acquisition cases. We see again the tendency for investors to shy away from investment in Quebec after 1977, with a temporary recovery in 1982/83. A larger share of investment goes to Ontario until the sharp drop in 1982/83. There is also a sharp increase in the figure for the western provinces in 1982/83. This phenomenon is apparent also in the data in Table 1 on the number of cases.

In Table 4 we have data on the type of business sector that attracts FDI acquisitions. We can see a similar stability here within each sector to which foreign investment has been directed. Manufacturing has been the object of 39 to 53 per cent of the applications, while wholesale and retail trade has occupied second place each year, with between 20 and 28 per cent of the applications.

Table 5, which presents the destination of proposed acquisitions by sector in terms of the dollar value of assets rather than the number of cases, shows similar results (with a minor anomaly in 1978/79) until 1980/81. The stability seems in 1980/81 to break down in the area of wholesale and retail trade, and in 1981/82 it seems to break down in manufacturing.

In Table 6, applications for manufacturing acquisitions are divided into particular types of manufacturing. The top five categories have generally been metal

fabricating, machinery, electrical products, chemicals, and food and beverages. No substantial shifts have occurred from one type of manufacturing to another, in spite of changing economic conditions.

In Table 7 data on manufacturing acquisitions are presented for the assets involved instead of the number of cases. Here more variation can be seen from year to year. For example, rubber and plastics have had a negligible amount of foreign investment, except for 1978/79 when they receive the very high figure of 17 per cent. No noticeable trends have developed over the ten years, however.

The statements made in regard to the assets involved in acquisitions in Table 7 are true as well for the distribution of cases for new businesses in Table 8. The top five categories have generally been the same, and no substantial shifts have occurred from one type of manufacturing to another, in spite of changing economic conditions.

In Table 9, we examine applications for acquisitions by business sector, from the United States, western Europe, and other regions. Again it does not seem that any long-term changes from the usual trends have been established. There is a small, steady increase in US investment in community, business, and personal services, and an increase in western European investment in wholesale and retail trade took place over 1977-85 as compared to 1974-77.

With Tables 10 and 11, we examine applications for the creation of new businesses. FIRA's provisions with respect to new businesses became law on 15 October 1975. In Table 10 we see a basic stability in the destination of investment applications, by region of origin. There is some indication that the interest of US investors in Quebec has diminished and that the interest of European investors in the western provinces has likewise diminished.

Table 11 classifies new business cases by applicants' region and by the sector of destination. Here we continue to see the basic stability of investment trends. For US investors wholesale and retail trade predominates, receiving 32 to 43 per cent of the

applications, while manufacturing is usually second, receiving 24 to 32 per cent of the applications. We can also see an increase in the importance of community, business, and personal services. The ranking of these categories is a reversal from the ranking in Table 9, which dealt with acquisitions rather than new businesses, and the difference may reflect the growth of new franchise businesses in the retail sector. This reversal is not as noticeable for western European investors, but here as well wholesale and retail trade seems to be more important for new business applications than for acquisitions.

In Table 12 we examine the destination and value of new business cases by Canadian province or region. Here too the appearance of stability remains, although more variation is present. Probably a few new businesses with particularly large assets introduce an erratic element into each year's asset figures. The trend away from investment in Quebec in 1977/78 again appears.

In Table 13 new business cases are classified by the amount of planned investment from the United States, Western Europe, and the rest of the world since October 1975. The year 1977/78 again stands out: the dollar value of new business cases from the United States, western Europe, and other regions was the lowest for the decade. There is also a noticeable drop in assets invested in 1981/82 for both the United States and western Europe, perhaps due indirectly to the existence of the National Energy Program.

Another basic question we might ask is whether any noticeable change has occurred in the percentage of applications coming from different regions. Table 14 examines this question for new acquisition cases and Table 15 for new business cases. For the former, little variation has occurred over the years. For the latter, 1975/76 appears atypical, but this is due to the small number of applicants during the first fiscal year that the new-business provisions came into effect. Apart from

this one year, however, Tables 14 and 15 emphasize the recurrence each year of basic and stable investment flows, apparently unaffected by FIRA's operations.

We suggested in the introduction to this section that we can find no concrete evidence that the existence of FIRA did or did not influence the decisions of foreigners to invest either in Canada as a whole or in particular provinces or particular sectors. Table 16, which looks at FIRA's record of resolved cases, indicates why this may be so; FIRA has disallowed only 6 per cent of the applications for acquisitions and only 6 per cent of the new business applications, in total, since it began operating. However, when we include the number of withdrawn applications along with those disallowed the figures are 14 and 16 per cent respectively. We do not know how many proposals were withdrawn solely because of FIRA. The *Globe and Mail* has reported that 'the official view, as presented by FIRA officials, is that approximately 60 per cent of all withdrawals are market-related [i.e. not due to FIRA]' (20 November 1982, p. B14). It is likely that some withdrawals occurred because of FIRA, and any such cases should of course be included in calculating the disallowance rate. But there is no way of getting at the 'true' disallowance rate, because the necessary data are unavailable. Nor, as pointed out earlier, do we know how many decided not to apply simply because of the existence of FIRA. Apart from its rejection of applications, FIRA may have been important in influencing decisions. Once again it seems that the magnitude and direction of FIRA's impact are unclear.

## CONCLUSION

From this examination we conclude that we can find no clear evidence that FIRA influenced the investment decisions of foreigners. It is difficult, from the available data, to separate out FIRA's influence from other factors that motivate foreigners in their decisions to invest in Canada. In short, the extent of FIRA's influence on foreign

direct investment patterns, or indeed whether in fact FIRA had any such influence, is unclear.

The argument can be made that we should not be surprised, or even concerned, that the impact of FIRA on the quantity of FDI is unclear since FIRA was directed primarily toward improving the quality of investments rather than limiting the quantity. However, the quality of a particular investment requires an extremely subjective value judgment. If measurement of the impact of FIRA on the quantity of FDI is difficult, how much more so is measurement of its impact on the quality of FDI?

# 3
# Fairness

## INTRODUCTION

We have suggested in the preceding section that the impact of FIRA on the Canadian economy is unclear. Another issue of importance is whether FIRA was fair from the perspective of the individual persons and corporations affected by it. One serious concern is that similar applicants may not have necessarily received similar treatment. Because FIRA's deliberations were conducted in secrecy, and information pertaining to resolved cases was not available to provide guidelines for other applicants, a high degree of uncertainty was introduced into the investment and investment-related decisions of both foreign and Canadian firms.

No public documentation exists concerning FIRA's pursuit of approved cases to ascertain that undertakings given by firms during review are actually carried out. Not one firm was prosecuted for failing to fulfil its undertakings, even though the Act gave FIRA the power to do so. The absence of prosecutions does not prove lack of enforcement; it only raises the suspicion. However, it may have tempted applicants to make promises in bad faith simply to gain approval. Consequently, the honest applicant may have been put to a disadvantage. Or perhaps the fear of FIRA was so great that no one dared to fail to fulfil his undertaking?

Canada was taken to the tribunal of the General Agreement on Tariffs and Trade (GATT) by the United States over the production and export undertakings commonly negotiated with each applicant by FIRA. A GATT panel found FIRA's purchase

requirements to be against the articles of GATT. This is another indication that FIRA's operation may have been unfair. Did FIRA violate our international legal obligations under GATT?

## THE REVIEW PROCESS

### *Inconsistency*

The political nature of the FIRA approach to regulation raises serious concerns about inconsistency in the decision-making process. It can be argued that the outcome of the process was arbitrary, depending on the economic and political circumstances of the moment. One indication of the importance of circumstances for the outcome of applications is evident in an observation by Peter Hayden, a Toronto lawyer and co-author of *Foreign Investment in Canada*, as reported in the *Globe and Mail*: ' "[FIRA is at this moment] just a nicer regime." He [Hayden] predicted that as Canada would climb out of the recession the Cabinet – responsible for approving the agency's recommendations – would tighten up the criteria for "significant benefit" ' (1 October 1983, p. IB7).

The arbitrary, ad hoc nature of the review process not only affected foreign applicants, but was also detrimental to Canadians involved. One analyst observed that a group often hurt is 'Canadian business owners who want to sell all or part of their concerns and find only foreign-controlled companies interested or willing to pay a fair market price' (Lilley, p. 43). FIRA's involvement in a deal could have had the effect of forcing the sale to a Canadian buyer at a price less favourable for the Canadian vendor. Foreign companies interested in selling either part or all of their Canadian operations experienced a similar problem: 'Foreign-controlled companies, too, trying to divest Canadian subsidiaries have discovered that when they attempt to avoid FIRA and deal only with a Canadian buyer, they're offered a fire-sale price' (Lilley, p. 143).

We have here a review process in which the success of an application may depend on when the application happened to be submitted rather than on the merits of the investment itself. Applications disallowed at one time could conceivably have been approved if presented at some other time. This is especially plausible given that neither the Agency nor the cabinet publicly announced detailed long-term economic policy guidelines within which to judge the merits of each investment proposal. This ad hoc process led to the risk of inconsistency and, therefore, of unfairness.

The argument can be made that there is a trade-off between consistency (or fairness), on the one hand, and flexibility to meet changed circumstances, on the other. FIRA attempted to be as consistent as possible. However, a change in the economic climate may have required FIRA to recommend to the minister approval of a particular application which, in the previous year, would have been rejected (or vice versa). It is even conceivable that, within a short period, a particular investment would be found of benefit to Canada and a subsequent identical investment would not. For example, the building of an airstrip at a remote community might be of considerable benefit to the residents, while the building of a second airstrip at the same location a year later might be redundant.

*Rules vs. discretion*

The designers or modifiers of FIRA could have chosen to provide broad policy goals and allow the regulators almost complete discretion in their decision-making process, permitting them to make decisions on a case-by-case, ad hoc basis. As a second approach, precise rules to be followed by those implementing the regulatory process could have been provided. Third, they had the option to combine both rules and discretion.

The first approach appears to be the one most favoured in regard to FIRA. An example of the broad degree of discretion allowed regulators can be drawn from

Section 2 of FIRA's act, which stipulates that for any new FDI to be approved, an applicant must have showed that there was to be significant benefit (net benefit in the new Investment Canada Act) to Canada from the investment. The problem inherent with this section is that it was almost impossible, in practice, to quantify objectively the economic benefits accruing to a country from any particular investment. Therefore, it is also difficult to give a precise definition to 'significant'. This measurement difficulty resulted in FIRA being given what might appear to be a substantial amount of discretion and a lack of objective measurement requirements in its rules.

*Imprecision and uncertainty*

FIRA could also be accused of unfairness on other grounds. Some of the loudest complaints by foreign businesses about FIRA concerned the Agency's complete discretion in applying the 'significant benefit' criteria to proposed investments. The Act stipulated that, for approval, an investment must bring a 'significant benefit' to Canada. However, FIRA had not made public any detailed interpretation of this extremely vague phrase, and there were no published guidelines (other than a sample of undertakings from a sample of accepted applications) that indicate the relative importance of the different sections of the criteria. This imprecision on FIRA's part has introduced an important source of uncertainty into business decisions of whether or not to invest in Canada.

From FIRA's news releases, Hayden et al (1984) compile many examples of undertakings made by successful applicants to FIRA. One example (p. 1140) considers the minister's comments on an approved new business:

> In announcing the Government's decision, Mr. Gray noted that this was the second application by Townsend and Bottum, Inc. to establish a new business in Canada. The first application was disallowed by the Governor in Council

on January 29, 1982. Townsend and Bottum, Inc. has since made several improvements and additions to its undertakings.

Four undertakings are then listed. However, FIRA did not state what undertakings were considered inadequate in the first application and did not seem to present a complete list of all the new undertakings in the successful application. Can an applicant examine partial lists of undertakings of the many and diverse types of businesses and from these lists conclude what undertakings he will be required to make in his particular application?

Ambiguity exists in interpreting the words 'significant' and 'benefit.' If FIRA's low rejection rate has any meaning (which it may not) then FIRA may have interpreted 'significant' in the statistical sense of being calculably greater than zero. Such an interpretation would be quite different from the concept of 'substantial' developed in the 1972 Gray Report, *Foreign Direct Investment in Canada.* Translating 'significance' into concrete terms is especially difficult: 'How many new jobs would be enough? What percentage of sales would have to be dedicated to R&D? How much production would have to be exported?' (Lilley, p. 47).

FIRA may have considered 'benefit' in a limited sense: a 'significant benefit' found in only one or two of the ten categories listed above on page 11 could have apparently made an investment acceptable. In its annual reports, as well as in news bulletins, FIRA often indicated its approval where there is an 'X' placed in only one or two of the ten categories, implying, perhaps, that the proposals involved no significant benefit in the other categories. With most foreign investment proposals in real estate the only categories in which an 'X' was placed are 'compatibility with industrial and economic policies' and 'new investment.' Further, some FIRA decisions have been presented as receiving an 'A*.' This indicates 'deemed allowance' or approval. Deemed allowance occurs when FIRA had not granted formal approval within the statutory time limits and had not applied for an official extension. In such cases no

details on the source or nature of benefits was given, other than a simple 'X' in particular categories.

One benefit category subject to wide variation in evaluation is that of 'beneficial impact on competition.' Competitors are not informed by FIRA of possible foreign investments, and no formal structure exists for them to present briefs. How can FIRA know the effect on competition if it cannot obtain information in this regard from the competitors of a particular applicant?

What could have contributed to a sense of unfairness and inconsistency is the policy that if a competitor *by chance* heard of an application it may indeed submit a brief and make its position known on the proposal (assuming it knows the name under which the application was made). However, a competitor may not have learnt about the application until it is too late to submit a brief.

The one category in which an 'X' seems to be required is 'compatibility with industrial and economic policies.' However, a meaningful or operational definition of 'industrial and economic policies' was not readily available either to applicants or to Canadians wishing to sell their businesses to foreigners. FIRA was originally intended to be one element in a long-run strategy for Canadian industrial and economic development, as discussed in the Gray Report, but a detailed framework was missing. Further, 'industrial and economic policies' change over time. But the importance of this 'compatibility' requirement is that few people outside FIRA could have developed an objective judgment of the likelihood of approval until an application had been submitted, had undergone some evaluation by FIRA, and had been the subject of some negotiations between FIRA and the applicant. Another complicating factor was that 'compatibility,' according to the Act, included the policies of the particular province where the investment will occur. Each provincial government consequently established a group responsible for deciding whether an

application for investment within its jurisdiction is 'compatible' with its own particular 'industrial and economic policies' of the moment.

The review process subjected applicants to delays, particularly in FIRA's earlier years, which may have resulted in deals being killed, especially those between Canadian vendors of existing businesses and foreign potential buyers. Despite the 60-day 'fail-safe mechanism' theoretically in place, in the period 1976-9, for example, the average period required to process standard-procedure cases was about 100 days. A decision by the Agency to hold over applications for more information and further review was very serious for the applicants involved. The adage 'justice delayed is justice denied' may have been appropriate in some cases.

This discussion has highlighted the individual, ad hoc nature of the review process, in which political considerations and other non-objective factors may have entered into the evaluation and thus affected the outcome, and in which negotiations must have depended to some extent on the individuals involved. Moreover, FIRA's recommendations to the minister as a result of these evaluations were not published or released to the applicants. The Agency simply announced the cabinet's decision that a particular application had been allowed or disallowed. Often the applicants themselves did not know why their proposals were disallowed. On these grounds as well it may be argued that the FIRA process was unfair.

As a final note we offer one more observation. FIRA's general attitude seems to have been that an applicant was guilty until proven innocent. The applicant must convince the Agency that it did not violate the law, i.e., the Foreign Investment Review Act. The onus was on the applicant to convince FIRA that the proposal should be allowed. The following section (10) of the Act is an example of this:

> Where the Minister, on completion of the assessment referred to in section 9, is of the opinion that the investment to which the assessment relates is or is

likely to be of significant benefit to Canada and less than sixty days have elapsed since the date of receipt by the Agency of the notice under subsection 8(1), (2) or (3) relating thereto, the Minister shall (a) recommend to the Governor in Council that the investment be allowed; and (b) submit to the Governor in Council in support of such recommendation a summary of the information and written undertakings to Her Majesty in right of Canada, if any, on the basis of which the recommendation is made.

The foreign investor was required to prove his innocence to the minister. Should not the foreign investor have been innocent until proven guilty? Perhaps FIRA should have been required to provide acceptable reasons for rejecting an application instead of requiring the applicant to show cause for approval. This change in focus would at least have been more consonant with the values of Canadian society, although admittedly it might not have been easy to implement.

## ENFORCEMENT OF UNDERTAKINGS

FIRA's annual reports emphasized the Agency's role in eliciting specific undertakings from foreign investors for specific production and export goals before the proposals were approved. Since published reports do not contain detailed information concerning compliance with these undertakings, it is impossible to evaluate FIRA's achievement in this regard. For example, the requirement that a specific percentage of purchases be made from Canadian firms was rendered unenforceable – and impervious to monitoring – by the provision that the Canadian firms must price competitively. If the foreign-owned firm cannot find Canadian suppliers offering prices competitive with imports, then it need not have complied with its undertaking in this regard. An essential first step should have been to conduct a thorough, public analysis of the undertakings and of compliance with them by the investors. A strong

argument can be made that clear guidelines for undertakings should have been developed and published, with the focus being FIRA's ability to monitor and enforce those undertakings. Perhaps an appropriate parliamentary committee should have monitored FIRA.

The Foreign Investment Review Act provided in sections 21 and 22 for the obtaining of court orders to enforce undertakings and for the citation and punishment of those who fail to obey such court orders. Section 21 states: 'Where a person who has given a written undertaking to Her Majesty in right of Canada relating to an investment that has been allowed by order of the Governor in Council fails or refuses to comply with such undertaking, a superior court may, on application on behalf of the Minister, make an order directing that person to comply with the undertaking.' Section 22 states: 'Any person who fails or refuses to comply with an order made by a superior court under section 19, 20 or 21 that is directed to him may be cited and punished by the court that made the order, as for other contempts of that court.'

These powers were rarely, if ever, been exercised by the Agency. The *Globe and Mail* reported that the current FIRA commissioner, Robert Richardson, told an audience that 'a defaulting company could be taken to court,' but added that he could not recall this ever happening (31 January 1984, p. 2). The FIRA process might have been made more equitable by stricter enforcement of undertakings. This should, in turn, have been based on clear and public guidelines. If undertakings are not enforced, applicants may be tempted to make promises they have no intention of keeping, and successful applicants may then violate their agreements with impunity. As a result the honest applicant may have been put to a severe disadvantage. Of course, FIRA may have enforced its undertakings in private discussions that did not involve or require court proceedings.

## FIRA AND GATT

In 1982 the United States claimed that Canada violated its treaty obligations under GATT concerning the undertakings that FIRA negotiated with potential investors. The United States contended that the purchase, manufacturing, and export requirements unfairly distorted trade and thus violated the articles of GATT. The GATT arbitration panel that studied the case ruled that FIRA's export performance requirements were not inconsistent with the agreement, while the undertakings to manufacture products and/or product components in Canada were not covered by its terms of reference. However, it found that requirements that investors purchase goods of Canadian origin or from Canadian sources did violate GATT by interfering with the principle of 'national treatment,' whereby imported products should not receive treatment less favourable than that given to products of national (i.e., Canadian) origin. Canada subsequently agreed to modify FIRA's procedures so as to bring them into compliance with the panel's findings.

This dispute over various types of performance requirements that FIRA negotiated indicates another aspect of the potential unfairness of the review process. Although not formally required to do so, investing firms usually had to present undertakings if their applications were to have a good chance of being allowed. Once the applications were approved, however, the firms may have found that because of local-content and other performance requirements they were forced to use more costly Canadian inputs. Domestic competitors, in contrast, did not have performance requirements to which they must adhere and were thus free to use the lowest-cost inputs, whether Canadian in origin or imported. The potential for inefficient production and misallocation of resources that these performance requirements could encourage may or may not have had a negative impact on the industries involved and on the Canadian economy as a whole. Clearly, though, they could be

interpreted by many as another unfair feature of FIRA's review process, albeit perhaps inevitable once a nation attempts to control foreign investment.

## CONCLUSION

We have in this section explored various aspects of the FIRA review process bearing upon the issue of fairness. The seeming inconsistency of decisions across applicants, the lack of public knowledge about how decisions are made, the assumption of guilt, the possible lack of enforcement of undertakings, and the unfavourable treatment of foreign investors resulting from performance requirements all lend support to the contention that the FIRA process may have been unfair.

# 4
# Justice

## INTRODUCTION

This report has examined the impact and fairness of FIRA as a regulatory process. In this section we turn our attention to FIRA's compliance with the principles of justice. We present several arguments for the view that FIRA was an unjust process. First, FIRA may have actually violate the fundamental principles of British and Canadian legal tradition and custom. Second, the decision-making body in the area of foreign investment regulation, the cabinet, was not thoroughly questioned in Parliament about particular decisions on FDI applications. We look at the Canadian Income Tax Act as a model in which there is less secrecy and thus more accountability. The whole tenor of FIRA could have changed overnight (as we have already argued) without Parliament altering the Agency's enabling legislation. Third, there is a possibility that the Act and the Agency may have violated parts of the Canadian Charter of Rights and Freedoms, as well as recently established principles of administrative law.

## THE RULE OF LAW

Albert V. Dicey is the author of a classic work on the nature of constitutional law, first published in 1885. Dicey presents (1959 edition, pp. 202-3) three criteria for the rule of law – the supremacy of law, equality before the law, and the basis of the constitution and of rights in ordinary or common law:

That 'rule of law,' then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view.

It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, or prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else.

It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the 'administrative law' (droit administratif) or the 'administrative tribunals' (tribunaux administratifs) of France. The notion which lies at the bottom of the 'administrative law' known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs.

The 'rule of law,' lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

The rule of law is supreme both in theory and in practice:

> No man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint (p. 188).

In examining the three points made by Dicey, the reader should consider how FIRA was run. For example, it allowed wide discretionary power to the government. Not all 'classes' (i.e., foreigners and Canadians selling to foreigners) are equally subject to the law. Was FIRA, then, a violation of British and Canadian standards of the rule of law?

*Administrative law in Canada*

The supporters of FIRA do respond to such questions. They argue that administrative law is unique and that the issue of due process as well as the principle of the rule of law, as described by Dicey, do not apply. If FIRA was to have attempted to engage in some activity outside its authority (ultra vires) then a public trial would be called for. If it attempted to grant licences to radio stations a judge would be called on to evaluate the facts and the law and make a decision as to whether the Agency was acting within the law. FIRA could have been answerable to our courts also if it were to make a decision not based on grounds either explicitly or implicitly provided for in the Act, especially if political motives were involved. This principle was laid down in *Roncarelli* v. *Duplessis* (1959) (*Supreme Court Report*, p. 121). However, if those deciding on a particular FIRA application, either in FIRA or the cabinet, used criteria outside those allowed by the Act, the applicant may not have been aware of this and so may not have been able to initiate legal proceedings. The principle of the rule of law may thus have been unenforceable.

Even within the practices of administrative law, FIRA can be criticized. Other administrative bodies often hold public hearings when a decision is to be made. The Canadian Radio-Television and Telecommunications Commission (CRTC) is a well-known example. With FIRA, there was no such possibility, no matter how important a particular decision was going to be for the country. One argument against allowing public hearings is that they would allow third parties to play a role in the process and possibly prevent projects that the Agency itself supports or allows projects that it opposes. Another argument implicitly accepted in the case of FIRA is that administrative law is different from judicial law and a fair hearing is not required. Also the companies involved usually do not want their affairs made public. In addition, if an applicant could go public if he so desired, this would also weaken the Agency's ability to negotiate concessions and undertakings. This leads us to the strongest argument against the operating rules of FIRA. The applicant did not negotiate with, or even present his arguments before, the bodies making the decision. He appeared neither before the cabinet nor before the relevant cabinet subcommittee.

A fundamental right for a citizen of this country is to be able to present a case in front of those who are to make decisions that will affect his or her welfare. The foreign investor negotiated with the Agency, but it is the cabinet that made the final decision. Even if the Agency and the applicant came to an agreement, the agreement was of no value, de jure, as the cabinet was not bound by the agreement and may totally reject it. But perhaps the greatest injustice is that the applicant was not granted an opportunity to present his arguments before the body that was to make the final decision, the cabinet. (This argument may apply to Investment Canada as the applicant does not present his views before the Minister.)

A recent article by Arnett, Rueter, and Mendes argues that 'the application of developing administrative law principles would force the Federal Government to

modify or eliminate many of the key policies which are the cause of complaint. In particular, the article explores the relevance of the duty of fairness as it has emerged from recent decisions of the Supreme Court of Canada' (p. 161). The authors discuss the ways in which the principles of administrative law require that FIRA practices be altered. 'In recent decisions, the Supreme Court of Canada has established that administrative and executive bodies have a duty to follow fair procedures' (p. 129). The authors interpret this to mean that 'the duty of fairness would at least accord the foreign investor the right to know the case he has to meet and afford him the opportunity of meeting it' (p. 135). Further, the representations of other parties and the views of other federal and provincial departments may be seen as irrelevant evidence, in which case FIRA's decisions may be appealed in the courts. This may also be true of FIRA's requirements for specific undertakings on the part of the applicants.

In summary, the authors' interpretation (p. 144) of the principles of administrative law would imply that:

> (1) before the Minister recommends disallowance of an investment proposal, he must advise the foreign investor of the case he has to meet;
> (2) the foreign investor must be given an opportunity to meet that case;
> (3) the Cabinet may not be entitled to consider information other than that received from the Minister but, in any event, if it does, before disallowing an investment because of such further information Cabinet (perhaps through the Minister) may well be obliged to advise the foreign investor of such further case he has to meet;
> (4) if so, the foreign investor should be given an opportunity to meet that further case; and
> (5) the Minister and the Cabinet cannot take into account matters, such as intervener bids, which are extraneous because of their source or matters, such as social or cultural policies, which are extraneous because of their nature.

Changes such as these are seen by the authors as necessarily consistent with recently clarified principles of administrative law. However, it is possible that applicants may have needed to enter legal proceedings against FIRA in order to create the precedents that would in fact have altered FIRA's procedures.

## ACCOUNTABILITY

### *Cabinet responsibility*

When Parliament passed the Foreign Investment Review Act it effectively gave the cabinet a high degree of discretionary authority over the types of foreign investment covered by the Act. Yet in the eleven years of FIRA's existence the interpretation seemed to have developed that FIRA was an independent regulatory agency that could and should be held responsible for its actions (Schultz et al, pp. 153-4, 157). This mistaken interpretation kept the cabinet, which was the actual decision-making body, out of the limelight, and consequently it was not held accountable for its decisions to allow or disallow investment proposals. A possible alternative could have been for the cabinet's decisions in this area to come under the scrutiny of the Statutory Instruments Act and a parliamentary committee.

FIRA's imprecision, evident in the limited nature of published guidelines and precedents for potential investors, leads us to regard it as potentially unjust. Applications were confidential, and even their existence was kept secret. Richard Schultz, who headed a 1980 study and wrote with several others *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act*, commented in an interview: 'There is no way to know or judge whether the Cabinet is upholding the law. There is nothing comparable to this level of secrecy in other regulatory processes ... FIRA is an example of a badly designed agency that abuses the concept of accountability' (*Globe and Mail*, 20 December 1980, p. B1).

The difficult task of maintaining the accountability of independent regulatory agencies to the public and to the public's elected representatives was made even more difficult in FIRA's case, precisely because the Agency's role was strictly advisory. The cabinet, which was the decision-making body, although theoretically answerable to Parliament and to the electorate, was able to take cover behind the confidentiality provisions of the Act and thus escape being held accountable for its decisions. We saw previously how difficult it is to draw any conclusions about FIRA's possible effects on the Canadian economy. Part of the reason for this is that the cabinet's decisions are made in secret.

*FIRA's unchecked power?*

A related criticism is that although the Act originally intended that FIRA would only make recommendations to the cabinet as to the merits of the applications with the final decisions to be made by the cabinet, it appears to some observers that the cabinet only rubber-stamped the Agency's decisions (Schultz et al, p. 72). Here, again, we run into the problem that the necessary information is not available. Thus, although the Act may appear to have been observed according to the letter of the law, it was possibly not being observed according to the spirit of the law. FIRA may have had, de facto, more power than was intended by Parliament when the Act was passed.

*FIRA and the cabinet could change the rules*

The whole tenor of FIRA could change overnight without the need to alter the provisions of the Act in Parliament. The development of a simplified procedure for small investments is one example of a major shift in FIRA's operations that did not require action by the legislature. A more obvious example was the 'about-face' in the Agency's attitude toward foreign investment that occurred during the 1982/83

period. The review criteria had been applied more rigorously in 1980-82 and were loosened considerably, at the same time that a new minister and new commissioner were appointed.

That the government was able to alter, fundamentally, FIRA's character so easily was due to the general, vague nature of the guidelines as laid out in the Act. A case can be made that the cabinet had in fact changed the original intent of the Act without having to amend the legislation before Parliament (see Welling and McLaren, 1983). The original concern of the Act was over the degree of foreign control of our economy; as stated in section 2(1): 'The extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern.' Observers pointed out, however, that the Agency's focus in bargaining for significant benefit did not seem to be on the degree of foreign ownership and control: 'What is of significant benefit has more to do with spin-off labour and entrepreneurial benefits than with Canadianization of ownership ... [What constitutes these benefits changes] according to the plan of the day' (Welling and McLaren, p. 17). The result was that the cabinet could easily change FIRA's character and direction simply through the process of allowing or disallowing proposals.

This issue of the appropriateness of FIRA's secrecy should be independent of whether one advocates or opposes the control of FDI in Canada.

*Alternative models*

The Canadian Income Tax Act is, like FIRA, an important example of the application of law to economic affairs. If FIRA would have imitated Revenue Canada the process might be as follows.

The applicant files a return describing the proposed acquisition or new business. The return is reviewed by the employees of FIRA. Within a few weeks a notice is sent out, either approving or disapproving the investment. If the Agency believes that the application does not fulfil the requirements of the Foreign Investment Review Act then a process of negotiation begins. If the applicant and the Agency cannot resolve the dispute then the process goes to the Foreign Investment Review Board (analogous to the Tax Appeal Board) for a public hearing, the decision of which would eventually be published. There would be the option of appealing this decision to the Federal Court of Canada. This process is consonant with Western legal practice and, with some appropriate modifications, could serve as an example of how the Foreign Investment Review Act might be made more just.

Another, possibly better model for FIRA (or IC) to follow is the Ontario Securities Commission, which has both notice requirements and third-party intervention.

It should be noted that secrecy in regard to corporate information and planning may be important to the applicant. Any attempt to open the FIRA (or IC) process to public scrutiny could hurt the applicant by providing potential competitors with valuable knowledge. This dilemma emphasizes the shortcomings of the FIRA (or IC) process.

## THE ACT AND THE CHARTER

FIRA also faced a serious problem that may have to be dealt with, for IC, soon. Canada now has, as part I to schedule B of the Constitution Act, 1982, the Canadian Charter of Rights and Freedoms. The Foreign Investment Review Act may violate any or all of three articles of the Charter.

Section 6(2)(b) states: 'Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right to pursue the gaining of a livelihood in any province ... ' Perhaps section 6(2)(b) may apply only to corporations

resident in Canada. Or it may not apply to corporations at all. However, FIRA often dealt with individuals and not corporations, and these individuals may have had recourse to this section.

Section 7 states: 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice ... ' Section 7 is possibly the key section both for corporations and individuals.

Section 15(1) states: 'Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' Section 15(1) may not apply due to section 15(2): 'Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.' If it can be shown that FIRA's decision ameliorated the conditions of some disadvantaged group such as the unemployed, section 15(1) may not apply. It may also not have applied if a corporation is not considered to be an individual.

This whole issue of whether the Charter applies to corporations, or whether only certain sections do, will be a serious issue before the Supreme Court of Canada within the next two years. In theory, the Supreme Court of Canada might rule that the Act violates the Charter. If it so ruled, this could mean that the Act could no longer be enforced. This may apply to IC.

## CONCLUSION

The regulation of foreign direct investment by FIRA was originally instituted under strong public pressure to do something about the high degree of foreign ownership

and control of the Canadian economy. The review process was altered by the decision-makers involved apart from formal amendments to the Act in Parliament. As Schultz et al commented in their report on the cabinet's role: 'There is no basis for informal parliamentary debate on the implementation of the statute and the operations of the process' (Schultz et al, p. 125). Where Parliament is kept in the dark there can be little informed public debate on the issue.

guarantee that foreign ownership would not become permanently locked into the Canadian economy' (p. 581).

In suggesting this purchase option Wonnacott is in effect trying to find an alternative to FIRA that would not interfere with the pattern of FDI as determined by market forces, while at the same time quietening people's concerns about FDI. A problem with this suggestion is that instead of addressing these concerns in a visible way within a reasonable time it puts off the solution for many years. Any alternative to FIRA must take into account the fact that Canadians are very aware of the high degree of non-Canadian ownership and control of the economy, and many Canadians look for signs of active government involvement in the FDI question. To try the sort of 'end run' around the issue that Wonnacott proposes would neither fool nor satisfy people that the foreign investment problem was being dealt with both adequately and soon enough. Further, such an approach may be unrealistic because of practical problems of implementation. Buy-out prices may be impossible to negotiate. Faced with the fact that they would have to sell their investment, foreigners could decide to restrict their investments in Canada to a significant degree.

A more concrete problem with this option is that after a firm has been operating in Canada for at least forty years it might at that point be politically difficult, if not impossible, to expropriate the firm from its shareholders. Such a move would, for example. open the possibility of retaliation by the home countries of the foreign firms subjected to expropriation. This in turn could be detrimental to Canadian firms operating in the affected countries.

### WONNACOTT'S PROPOSED TAX ON FDI

A second alternative, more recently discussed by Wonnacott (1982b), is an open tax on all foreign investment in Canada. This method might be clearer and fairer than

the current FIRA process. The tax would reduce the amount of foreign investment and hence of foreign control of the economy, as desired. And since it would be an above-the-board policy that is easily administered it would avoid the drawbacks of FIRA's complicated procedures (p. 86). Also, Canadians would gain the revenue that the foreign firms would pay to the Canadian treasury; we did not receive anything of the kind with FIRA.

The tax would introduce some costs and distortions, as with any tax. But precisely because tax policy is a common tool economists are well aware of how a tax works, and so there would be few surprises in store when we analysed the effect of this particular tax on the economy. However, Canada is looking toward increasing the amount of FDI in order to create employment opportunities, stimulate technological progress and economic growth, and to strengthen our competitiveness in international trade. In this environment those people advocating a tax on foreign investment do not seem likely to get very far. In addition, a tax is also a radically different regulatory mechanism than the screening agency that we have had for eleven years. FIRA was in existence long enough that it may be difficult just to shut it down. Even IC may be a continuation of FIRA in a modified form.

## THE INCOME TAX ACT MODEL

As we noted in section 4, the structure of the Income Tax Act could be applied to the FIRA process. We refer the reader to the earlier section for one example of how the Income Tax Act model might be applied to FIRA. This approach might alleviate some of the major drawbacks of the current FIRA process, which include the lack of written precedents and the lack of opportunity for a public hearing.

## AN AUSTRALIAN APPROACH

A recent study by David Anderson (1984), *Foreign Investment Control in the Canadian Mineral Sector: Lessons from the Australian Experience*, contrasts the Canadian and Australian approaches to regulating FDI, specifically in the non-petroleum mining sector. Anderson presents a strong case for Canadians learning from the Australian approach, particularly for the following reason: 'The Australian regulatory apparatus has been largely accepted by the relevant national and international interest groups. In contrast, the Canadian Foreign Investment Review Act and ... FIRA [have] been the source of widespread domestic and external criticism' (p. xiii). Insights gained from studying the Australian regulation of the mineral sector point toward a third alternative to FIRA for regulating foreign investment in Canada.

The Australian system, in place since 1976, concentrates on the degree of foreign ownership. Each new mining project must normally have at least 50 per cent Australian ownership (75 per cent for uranium projects) in order to be approved by the Foreign Investment Review Board (FIRB). There is a 'naturalization process,' introduced in 1978 (p. 96), which, as Anderson explains, grants to companies whose actual level of Australian ownership may be as low as 25 per cent prior credit for having 51 per cent Australian ownership (p. 98). 'In return, they publicly agree to move towards the 51-per-cent target and to ensure that a majority of the voting members on their Board of Directors are Australian citizens' (p. 96). Approval must be obtained for each new mining project involving a total investment of A$5 million or more or takeover by a foreign firm of a firm with more than A$2 million of assets (p. 77).

Like the Canadian system, the Australian system screens FDI in general to ascertain that the proposed investments are not contrary to the national interest (p. 74). However, the Australian system focuses the regulators' attention on the degree

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Like the Canadian system, the Australian system screens FDI in general to ascertain that the proposed investments are not contrary to the national interest (p. 74). However, the Australian system focuses the regulators' attention on the degree

of foreign ownership. In fact, in the mineral sector the Australian approach 'is virtually to ignore the national benefits test associated with the general screening mechanism. Instead, it relies on a sector-specific quantifiable test'. The 'not contrary to the national interest' condition and the 50 per cent (or 75 per cent for uranium) Australian equity condition must both be met for a project to be approved, with the latter dominating in practice (pp. 123-4). Thus, in the mining sector the Australians in effect use a 'fixed rule' approach.

Certain features make this an appealing model for Canada. Anderson notes that such an ownership requirement for FDI in Canada should 'reduce the decision time, virtually eliminate the uncertainty faced by proponents, and largely preclude the need to negotiate innumerable performance undertakings' (p. 4). Moreover, this 'fixed rule' method of regulation is not new to Canada; for example, we have highly restrictive controls on foreign direct investment in banking, communications, publishing, life insurance, and petroleum. In fact, when there was serious concern about FDI in any particular sector, it seems that we did not leave the regulation of that sector to FIRA.

Nevertheless, there are subtle yet important differences that make the Australian approach not immediately applicable to the Canadian experience with FDI regulation. First, the Australian focus is on the individual investment project rather than the firm, which is FIRA's focus. The FIRA process does not touch any expansions by existing foreign firms into 'related areas' of business; in Australia every project, whether new or an expansion by an existing firm, must meet the 50 per cent Australian ownership criterion. For Canada a change in focus to the project level would bring much more FDI within the scope of the review process, and this could lead to strong protests from businesses which were left alone by FIRA. The advantage to the project-level focus for Australia is that it 'allows the government to control the level and nature of FDI in all new mineral projects. In this way, all

foreign interests are treated alike, policies characterized by retroactivity [like the National Energy Program] can be avoided, and yet the government can demonstrate tangible success as perceived by most economic nationalists' (Anderson, p. 125).

However, a more important difference is that to a great degree Canadians' concern about FDI has been focused not just on natural resources but on the maufacturing sector as well. One could argue that given the broad goal of bringing 'significant benefit' to Canada, a bargaining approach toward controlling the future behaviour of manufacturing firms is more appropriate. Clear and public fixed rules would not allow the regulators to take into account differences between applicants and across the diverse sectors of the economy. In this respect FIRA's 'bargaining scheme' may have had some unique merit. As pointed out earlier, allowing such flexibility in determining policy may contrast with the goal of having clearer, open rules and less discretion. Those who supported the operating procedures of FIRA may have decided that the need for FIRA to have both flexibility and the ability to bargain from strength warrants the risks that this power may be abused. We are suggesting that some thought be given as to how far this flexibility had gone and whether the end justified the means. The reader should realize that it is possible that any proposed solution will leave many critics unsatisfied.

## DIRECT CONTROLS OVER PARTICULAR SECTORS

The Australian approach to regulating FDI in mining can be viewed as using fixed rules in the key mining sector. As noted above, this key-sector approach to regulation is not new in Canada. Outside the FIRA structure, legislation exists and proposals have been advocated that affect foreign ownership of particular sectors of the Canadian economy. In 1980, for example, the National Energy Program was announced; this seriously affected foreign ownership of oil and gas deposits. The entire energy issue – including the price structure, investment, and exploration

incentives, and the tax system – has been subject to detailed involvement by federal and provincial civil servants. The percentage of the oil and gas industry owned by non-Canadians has since been determined by regulations established in the political arena. A myriad of regulations determines many operational decisions of foreign-owned firms.

The same kind of environment exists in the banking sector. Recent changes in the regulations permit more involvement by foreign banks, but here again this participation is closely scrutinized by federal civil servants. Interpretations of the relevant legislation and decisions as to how extensively each foreign bank will be permitted to operate have the potential to create a regulatory system similar to the FIRA process we have been describing in this report.

The *Globe and Mail* of 5 September 1984 reports on the increase in asset ceilings granted to eleven foreign banks. The article points out that banks that allowed their assets to increase beyond the amount allowed by the Bank Act or that failed to do business with medium-sized domestic businesses to the extent promised when they applied for their licences were passed over. The article reinforces the suspicion that the Bank Act's means of dealing with foreign banks in Canada is a slightly modified version of the Foreign Investment Review Act.

The issue of landownership by foreigners could potentially increase in political importance. Already Prince Edward Island and Saskatchewan have legislation to limit such ownership. A widespread political feeling exists that Canadian-owned land should be an inalienable feature of Canadian life. We may well see provincial legislation in this area in the near future, not only for this reason, but also because land prices have increased and may again increase rapidly. Federal legislation may be impossible, as landownership is a provincial matter. Many people feel that windfall gains caused by rising land prices should not fall into foreign hands because

these gains are a result of Canada's economic progress and not of special improvements made by foreign owners.

The following two lists cite various acts passed by the federal and the Ontario governments concerning FDI. Details of the enactments can be found in Appendix 2 of this report.

Federal legislation includes the Bank Act, the Broadcasting Act, the Canada Business Corporations Act, the Canada Development Corporation Act, the Canadian and British Insurance Companies Act, the Loan Companies Act, the National Energy Program, the Trust Companies Act, and the Territorial Lands Act.

Ontario legislation includes the Business Corporations Act, the Collection Agencies Act, the Employment Agencies Act, the Insurance Act, the Liquor Licence Act, the Loan and Trust Corporation Act, the Mortgage Brokers Act, the Non-Residential Agricultural Land Interests Registration Act, the Ontario Energy Corporation Act, the Ontario Securities Act, the Ontario Transportation Development Corporation Act, the Paperback and Periodical Distributor's Act, and the Public Lands Act.

The sectors referred to illustrate the extensive familiarity of Canadian policy-makers with a sector-by-sector approach using fixed rules to regulate foreign investment and the activities of foreign firms in Canada. The lists thus represent a range of important potential alternatives to the FIRA process. Enforcement of the various acts mentioned was not the responsibility of FIRA.

## PROPOSED 1980 AMENDMENTS TO THE ACT

In considering alternatives to FIRA, thought should also be given to the amendments to the Act promised in the 1980 Speech from the Throne. These amendments were never presented to Parliament and have faded from discussion, but they still offer significant alterations to FIRA's operations, within the framework of the Act.

Herb Gray, for several years minister responsible for the Act, repeatedly stated that the Act would be amended. The Speech from the Throne of 14 April 1980 promised the specific changes Mr Gray had advocated. First, major acquisition proposals by foreign companies would be publicized prior to a government decision on their acceptability. Second, the government would assist Canadian companies wishing to repatriate assets or to bid for ownership or control of companies subject to takeover offers by non-Canadians. Third, the government would institute performance reviews of how large foreign firms were meeting the test of bringing substantial benefits to Canada. We will look at the three amendments in turn.

*The first amendment*

Three issues would have had to have been clarified before the amendment could have been presented to Parliament.

First, what would be the definition of 'major'? Would the definition be fair and consistent? What percentage of applications would be included by this definition for the purpose of receiving publicity? Why should only 'major' acquisition proposals be included? A strong argument could be made that the word 'major' should be eliminated, because no reasonable grounds exist for this artificial differentiation. A prime objective of the proposal seems to have been to increase Canadian ownership in these circumstances. It is likely that small acquisitions can be financed more readily by Canadians than large acquisitions, and so to eliminate small acquisitions from receiving publicity might remove much of the value of the proposal.

Another object of the proposal may have been to permit the presentation of briefs by the public to FIRA administrators. It is not clear why this should be more important for major acquisitions than for minor ones. The fact that competitors, employees, and the general public would not have advance notice for non-major

acquisitions and hence would not be able to submit their views to FIRA, but yet would be able to do this for major acquisitions, seems inconsistent.

Second, what would be the nature of the publicity process? For the proposal to be useful, a substantial amount of time would have to be allocated to this process. Potential Canadian investors would need time to analyse the business in question and to organize their financing. The publicity would have to be thorough so that all Canadians would have an equal opportunity to develop a proposal. From the point of view of presenting a brief in opposition to the application, time would also be important, especially if a group of citizens wished to drum up public support for its position.

Under FIRA, 100 days were required on average to process a standard application. We could expect a substantial lengthening of the process if this proposal were to be meaningful. This would add to the expense and uncertainty faced by the applicant and the vendor and might simply destroy the possibility of acquisition if the applicant or the Canadian vendor could not wait that long.

Third, would social costs and harmful effects be taken into account with this new provision for publicity? We might expect that submissions from competitors, employees, or the general public would focus on harmful effects or social costs. If these were not considered in the review process, then this element of the proposal might not be effective.

*The second amendment*

The second amendment, providing financial assistance, could, at one extreme, have had a negligible effect or, at the other extreme, could largely have eliminated foreign direct investment in Canada. The impact would depend on the nature and extent of the financial assistance provided to Canadians in the drafting of their acquisition

plans. It would also depend on the manner in which the publicity amendment, discussed above, was implemented.

If the government offered loans to Canadians on the same terms and conditions provided by the private financial sector, then Canadians would not be likely to outbid foreign applicants. However, by offering interest rates lower than those available commercially and by offering repayment terms extended over more years than provided for in normal loan transactions, the government could enable Canadians to outbid foreign applicants consistently. The actual effectiveness of this amendment would depend also on the stringency of the review process as a whole. Foreigners might have come to feel that the difficulty and expense of negotiations – together with the probability of facing a government-financed counter-bid – simply ruled out Canada as an area for future investments. The minority of potential investors who claim to have been deterred by our foreign investment controls in Duncan McDowall's study published by the Conference Board of Canada and discussed in section 2 could well grow to be a majority if the complexity and effectiveness of FIRA's regulations were increased.

The problems inherent in implementing this second proposed amendment emphasize the political nature of the entire FIRA issue. Economists have indicated the importance to Canada of acquiring advanced technology. Studies have indicated that foreign direct investment, as opposed to licensing, is a major mechanism for bringing innovation into Canadian manufacturing (see, for example, Globerman, 1973). Yet the importance, politically, of increasing Canadian ownership may mean that shutting out foreigners is worth the cost. The government must choose some position between the possible extremes outlined above. This choice – based on a particular interest rate structure and repayment terms – will be a political decision. As such, it may vary from year to year. It is probable that there will be some inconsistency and unfairness in dealing differently with different Canadian bidders.

All these factors would have meant that FIRA's administration would become political in nature.

*The third amendment*

The third proposed amendment would also be lacking in significance unless and until the 'test of bringing substantial benefit to Canada' was clearly enunciated and the penalties for non-performance were promulgated. It is possible, at the one extreme, that the components of the test would be vague and open to such a variety of interpretations that the test would be meaningless, or, at the other extreme, it is possible that the test would bring civil servants into the operational decisions of the firm on a regular basis. How this amendment would be worded and implemented would again be a political decision. Ultimately, it would be the courts that give it rigour.

Two sets of tests have been presented over the years. The first was issued in 1966 by Robert Winters, then minister of trade and commerce. It was printed, with implicit approval, in the 1972 Gray Report (pp. 324-5). These guidelines provided as follows:

> a) pursuit of sound growth and full realization of the company's productive potential, thereby sharing the national objective of full and effective use of the nation's resources;
> b) realization of maximum competitiveness through the most effective use of the company's own resources, recognizing the desirability of progressively achieving appropriate specialization of productive operations within the internationally affiliated group of companies;
> c) maximum development of market opportunities in other countries as well as in Canada;
> d) where applicable, to extend processing of natural resource products to the extent practicable on an economic basis;

e) pursuit of a pricing policy designed to assure a fair and reasonable return to the company and to Canada for all goods and services sold abroad, including sales to the parent company and other foreign affiliates;
f) in matters of procurement, to search and develop economic sources of supply in Canada;
g) to develop as an integral part of the Canadian operation wherever practicable, the technological, research and design capability necessary to enable the company to pursue appropriate product development programmes so as to take full advantage of market opportunities domestically and abroad;
h) retention of a sufficient share of earnings to give appropriate financial support to the growth requirements of the Canadian operation, having in mind a fair return to shareholders on capital invested;
i) to work toward a Canadian outlook within management, through purposeful training programmes, promotion of qualified Canadian personnel and inclusion of a major proportion of Canadian citizens on its board of directors;
j) to have the objective of a financial structure which provides opportunity for equity participation in the Canadian enterprise by the Canadian public;
k) periodically to publish information on the financial position and operations of the company;
l) to give appropriate attention and support to recognized national objectives and established government programmes designed to further Canada's economic development and to encourage and support Canadian institutions directed toward the intellectual, social and cultural advancement of the community.

In 1975 a second test was issued by the federal government as *Principles of International Business Conduct.* This test has been reprinted, again with implicit approval, by FIRA in its *Businessman's Guide* (pp. 6-7) to the Foreign Investment Review Act. In this set of principles, the government asks foreign companies to:

a) pursue a high degree of autonomy in the exercise of decision-making and risk-taking functions, including innovative activity and the marketing of any resulting new products;

b) develop as an integral part of the Canadian operation an autonomous capability for technological innovation, including research, development, engineering, industrial design and preproduction activities; and for production, marketing, purchasing, and accounting;

c) retain in Canada a sufficient share of earnings to give strong financial support to the growth and entrepreneurial potential of the Canadian operation, having in mind a fair return to shareholders on capital invested;

d) strive for a full international mandate for innovation and market development, when it will enable the Canadian company to improve its efficiency by specialization of productive operation;

e) aggressively pursue and develop market opportunities throughout international markets as well as in Canada;

f) extend the processing in Canada of natural resource products to the maximum extent feasible on an economic basis;

g) search out and develop economic sources of supply in Canada for domestically produced goods and for professional and other services;

h) foster a Canadian outlook within management, as well as enlarged career opportunities within Canada, by promoting Canadians to senior and middle management positions, by assisting this process with an effective management training program, and by including a majority of Canadians on boards of directors of all Canadian companies, in accordance with the spirit of federal legislative initiatives;

i) create a financial structure that provides opportunity for substantial equity participation in the Canadian enterprise by the Canadian public;

j) pursue a pricing policy designed to assure a fair and reasonable return to the company and to Canada for all goods and services sold abroad, including sales to parent companies and other affiliates. In respect to purchases from parent companies and affiliates abroad, pursue a pricing policy designed to assure that the terms are at least as favourable as those offered by other suppliers;

k) regularly publish information on the operations and financial position of the firm;

l) give appropriate support to recognized national objectives and established government programs, while resisting any direct or indirect pressure from foreign governments or associated companies to act in a contrary manner;

m) participate in Canadian social and cultural life and support those institutions that are concerned with the intellectual, social, and cultural advancement of the Canadian community; and

n) endeavour to ensure that access to foreign resources, including technology and know-how, is not associated with terms and conditions that restrain the firm from observing these principles.

It is likely that the third proposed amendment, instituting performance reviews, would have included a test such as the one above. This approach, however, could have left interpretation to FIRA; foreign-controlled firms would again face extreme uncertainty, this time vis-à-vis the outcome of the reviews. If the amendment were to take this form its implementation could be political. The nature and extent of government intervention would vary substantially over time, and the ad hoc decisions of FIRA would create an atmosphere of ambiguity and inconsistency. Those who favour the elimination of FIRA may argue that the above proposed amendments to the Act would only make the unfairness and lack of clarity of FIRA even greater.

## THE CANADIAN BAR ASSOCIATION BRIEF

On 24 September 1981, the Canadian Bar Association (CBA) submitted a brief on the Foreign Investment Review Act to the Honourable Herb Gray, the minister responsible for administration of FIRA. In this brief, the CBA expressed support for the concept of an FDI review procedure.

> Because of the unique nature of the foreign ownership position in Canada, where many key industries are dominated by large foreign-owned firms, the CBA believes that foreign investment review is an important function of a national economic development policy. The Review Agency has, we believe, had a positive effect on the activities of non-eligible persons whose takeovers or new businesses have come under Review Agency scrutiny (pp. 73-4).

Nevertheless, the CBA did recommend reforms of FIRA which would change its basic thrust and purpose. They expressed concern that foreign investors currently

regarded FIRA as a 'policing mechanism', and they urged that this atmosphere be transformed into a 'positive experience'. Many of the specific proposals that they advocated have been discussed above, in the context of others' writings, but the following five points deserve reiteration as they bear directly upon the review process:

> We believe the information flow within the review process would be improved by the following means:
>
> (a) establishing formal administrative procedures so that applicants may learn of the status of their application both as to the Review Agency's disposition towards it and timing;
> (b) publishing departmental position papers to reflect the policy of the government in any given area;
> (c) having a governmental industry representative, familiar with the business subject to review, participate at the Review Agency meetings with an applicant;
> (d) permitting applicants to prepare a summary position of their case with the assurance that the summary would be made available to the ultimate decision-making body; and
> (e) establishing a formal procedure to enable an applicant to have a hearing with the Review Agency or a committee thereof as part of an applicant's final representation (p. 4).

The particular process followed by FIRA received heavy criticism:

> The CBA believes the review process has not functioned as the Gray Report intended nor in a manner acceptable in terms of commercial reality ... In light of the criticism to which the review process has been subjected it seems clear the review process is not functioning in an efficient, businesslike and meaningful manner (p. 5).

The CBA brief also dealt with the three amendments proposed in the 1980 Speech from the Throne. It feared that any public announcement of pending acquisitions would seriously deter foreign investors, particularly if the latter could expect competition in takeovers from government-financed bids. That is, the first and second proposed amendments would work together in a powerful manner, and Canada's benefits from FDI would be unnecessarily diminished. With regard to the third amendment, the CBA strongly opposed any monitoring of existing, large, foreign-owned firms. Rather, they recommended that such firms merely be encouraged to comply with principles of business conduct. Alternatively, any monitoring process should apply to all corporations, both Canadian and foreign-owned.

It should be noted that on 2 March 1982, Mr. Gray issued a detailed reply to the CBA brief of 24 September 1981. In this reply, Mr. Gray presented some sixty-two responses to particular CBA points. Although he responds positively to some of the suggestions, for the most part Mr. Gray's answers are a strong defence against the CBA's criticisms of FIRA.

Many of Mr. Gray's answers to the CBA's comments are also possible answers to some of the criticisms found in this book. As this debate between the CBA and the minister is of such significance, we have included portions of it as Appendix 3 to this paper.

## MEASURES TO INCREASE DIRECT INVESTMENT BY CANADIANS

We should remind the reader that many government programs attempt to raise direct investment by Canadians. To the extent that these are successful, they provide an alternative set of solutions to some of the issues with which FIRA seeks to deal.

Some observers point to low capitalization of Canadian firms as a precarious situation threatening our economic recovery. William Mackness (1984) feels that the reason Canada's real GNP fell by 6.5 per cent during the course of the 1981-82 recession, compared with a drop of less than 3 per cent in the United States, was the lower level of capitalization (common equity as a proportion of total assets) in the Canadian economy as well as the weakened financial structure of the government sector. 'Official statistics indicate that industry in the United States is about 25 per cent better capitalized than industry in Canada' (p. 26). More telling than the drop in real GNP was the fact that employment fell by 5 per cent in Canada compared to a drop of less than 2 per cent in the United States. He also points out that Canadian-controlled companies, as of 1980, had an average capitalization rate of about 32 per cent while foreign-controlled companies operating in Canada had a rate of about 45 per cent. Thus, Canadian-controlled firms are at a financial disadvantage both within Canada and especially relative to the United States.

Mackness feels that the low level of capitalization is responsible for the fall of more than 20 per cent, in real terms, in business investment spending over 1982-83 and a possible further decline in 1984. He feels that 'this will be the most severe and prolonged decline in business investment spending since the 1930s' (p. 24). Faced with a slowdown in the Canadian economic recovery, Mackness felt that the 'weight of evidence is persuasive' (p. 24) that both the corporate and government debt levels may be responsible.

Perhaps a more widespread fear exists that Canada needs substantial investment in order to provide jobs. Of particular concern is youth unemployment. Temptations exist to throw open the doors to FDI as a means of improving the capitalization of Canadian firms so as to strengthen their ability to survive hard times and also as a means of increasing job opportunities in Canada. In this context as well,

government policies that encourage investment by Canadians can be seen as an alternative approach.

Two broad sets of programs deserve special mention. First, pension provisions and, in particular, income tax deductibility for pension contributions have the potential to shift vast sums into Canadian equities. Second, tax treatment of dividends, capital gains, and capital losses can also influence the investment decisions of Canadians. Beyond these, a myriad of individual industrial policies offer special financial incentives such as grants, loans, loan guarantees, and tax concessions to encourage Canadian investment of particular types.

It is not our purpose here to examine the advantages and disadvantages of each government program. Our purpose is simply to introduce the more positive view that an alternative to restricting and modifying FDI is the encouragement of direct investment by Canadians. Further, the stimulation of Canadian direct investment should be considered as an alternative to seeking foreign investment funds for capitalization or employment objectives.

## SUMMARY

In this section we have discussed various alternative methods of regulating FDI. We refer the reader to Safarian for methods currently being used in other developed countries. We looked at several alternatives that varied greatly in their approach to regulation; in this group was Wonnacott's purchase option and an open tax on all foreign investment. We examined the Australian approach used in the mining sector and noted that fixed rules in certain specified sectors have been in use in Canada at both the federal and provincial levels for some time. We finally turned to a discussion of some possible amendments to the Act itself, focusing attention especially on changes proposed in the 1980 Speech from the Throne.

In section 6 we discuss the changes to FIRA in the new Investment Canada Act. In particular we try to differentiate between the cosmetic and the real changes.

# 6
# Investment Canada

*The purpose of this book*

The primary goal of this book has been to describe and evaluate aspects of the operation and mechanics of FIRA as a regulatory process and agency. We wished to concentrate on the lack of clarity of the criteria used by FIRA, the difficulty in evaluating and even measuring FIRA's impact, questions of fairness and justice, the degree of discretionary power that FIRA had, alternative models for FDI regulation, etc. We did not wish to emphasize the question of whether foreign direct investment (FDI) should or should not be controlled. We want to say to the reader, 'This is how the regulation of FDI has proceeded in Canada. Is this *process* acceptable to you?'.

*Recent changes to* FDI *control*

On 2 July 1985 the Investment Canada Act replaced the Foreign Investment Review Act. The Foreign Investment Review Agency was replaced by Investment Canada. The purpose of the Investment Canada Act is set out in Section 2 of the act:

> Recognizing that increased capital and technology would benefit Canada, the purpose of this Act is to encourage investment in Canada by Canadians and non-Canadians that contribute to economic growth and employment opportunities and to provide for the review of significant investments in Canada by non-Canadians in order to ensure such benefit by Canada.

Before we explain why we feel that ,much of what has been said in this book about FIRA applies to Investment Canada, we would like to outline some of the details of the new act.

The Investment Canada Act provides for significant change in the area of new businesses. It exempts almost all new business cases from review, but it does require a notification to Investment Canada of these investments. The purpose of the notifications, it seems, is to enable Investment Canada to monitor culturally sensitive areas of the economy. We agree that this is a significant change from FIRA. However, this notification process means that the FIRA process can be reinstated for new businesses with little difficulty or delay. Should we not be suspicious that this is one of the reasons for continuing a notification process for new businesses?

If the Investment Canada Act had been in place in 1984, the total *number* of investments subject to review would have been reduced by about 92 per cent. However, almost three-quarters of the asset values involved would have still been reviewed (*Globe and Mail* 8 July 1985, p. B1-2). The review process it now to be faster and simpler.

A direct acquisition by non-Canadians will be subject to review only if the total assets of the business being acquired are $5 million or more. An indirect acquisition, resulting from the acquisition of a parent company outside Canada, will be subject to review when the Canadian subsidiary has assets of $50 million or more. The exception to the latter is the case where the Canadian assets represent more than 50 per cent of the international transaction. The $5 million limit then applies. All investments in culturally sensitive areas such as book publishing and film production and distribution will be subject to review.

For an acquisition to be approved, the new criterion is to be whether the investment is to be of net benefit to Canada (Investment Canada Act, Section 2).

This criterion of 'net benefit' replaces the stronger criterion of 'significant benefit' which was in the FIR Act.

There appears to be firm deadlines for decisions to be made. Only the Minister makes the decision and not the entire Cabinet. The purpose of this change is to further speed up the review process.

There are clearer criteria as to the status of corporations. It is now going to be easier to decide whether a corporation is non-Canadian and therefore requires Investment Canada review and the Minister's approval if it wishes to acquire a Canadian business.

Indirect takeovers are not explicitly discussed in the FIR Act. They are dealt with, explicitly, in the Investment Canada Act (Investment Canada Act, Section 28). Since some observers have felt that FIRA may have had no authority in reviewing indirect takeovers (Canadian Bar Association, p. 25), the inclusion of this provision in the Investment Canada Act was advisable.

At this point we would like to discuss why we feel that the changes from FIRA to Investment Canada have not been as dramatic as portrayed in the press.

The criterion of 'net benefit' of Investment Canada is virtually as unclear as 'significant benefit' of the FIR Act. It is also just as subjective a criterion. The Investment Canada Act retains the same unclear, subjective criteria (with some minor modifications to the wording) as was used to define 'significant benefit' in the FIR Act, except they are now used to delineate 'net benefit'. In addition, two new and similarly unclear criteria have been added. These are:

> (e) the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
> (f) the contribution of the investment to Canada's ability to compete in world markets. (Investment Canada Act, Section 2)

The decision making power now rests in the hands of one man, the Minister. At least under the FIR Act, responsibility, at least in theory, rested in the hands of more than one individual, namely the Cabinet. The desire to speed up the review process will result in great responsibility resting in the hands of one man. It may have been advisable to replace the Cabinet as the decision-making body, but was it wise to replace it by one man?

There is still, for all practical purposes, a lack of an appeal procedure. The Minister's decisions are final.

The new limits of $5 million and $50 million would still have required review of *90 per cent, in dollar value*, of the 1983 direct acquisitions and 55 per cent of the 1983 indirect acquisitions (*The Public Sector* 11 December 1984, p. 1 and Sinclair Stevens as quoted in the *Globe and Mail* 8 December 1984, p. 1). Sinclair Stevens has emphasized the large number of small takeovers which will no longer be reviewable. It is true that in terms of cases, both new businesses and acquisitions, Investment Canada would review only 10 per cent of the *number* that it would have been required to review under FIRA. However, probably more important is the lack of change with respect to the economically more significant, larger takeovers.

There is now to be a 75 day time limit (45 days plus an option, readily available to the Minister, of an additional 30 days). If there is no decision by the Minister in 75 days, approval is automatically granted. What has not been emphasized is that there is an option available for the *applicant* to request an extension. The Minister (or Investment Canada) can, in theory, suggest to the applicant that if he does not agree to request an extension, then he will not receive approval. The 75 day limit can be, de facto, meaningless.

There is still a need, when the Minister so desires, to negotiate undertakings (Investment Canada Act,Section 23). Our comments on this aspect of FIRA probably still apply to Investment Canada.

The secrecy has not been lessened. It may, if this is even possible, have been increased.

It is probably true that the current government may behave as it says it will and that Investment Canada will either be neutral or actually encourage FDI. However, if the current government so desires, or if the government changes, the new Investment Canada legislation could allow the Investment Canada Agency to behave in a manner which may be almost indistinguishable from FIRA. Also, only minor amendments to the act could quickly make Investment Canada identical to FIRA.

There is still no requirement for Investment Canada to even try and produce the kind of data that might be used by an econometrician to evaluate its impact. It may be technically and/or theoretically impossible to even compile such data, but at least some attempt might be made.

Why should the government continue to review the takeover of a business which is currently owned by a non-Canadian? Such a takeover does not increase the level of foreign ownership of Canadian business.

In the US, we have seen both the number and magnitude of takeovers reach levels which no one would have believed were possible. The reader might ask him/herself whether, given the flexibility that the government has to make Investment Canada almost anything it wishes, how would the government react if aggressive US corporate raiders turned their attention to Canada. If the reader answers, that they would be forced to make Investment Canada behave in the manner that Canadian nationalists would have liked to have seen FIRA behave, then the arguments found in this book will be of even greater relevance and interest.

# 7
# Conclusion

## CONSEQUENCES OF REGULATING FDI

The extent of foreign ownership and the behaviour of foreign-controlled firms have become a prominent political issue and will remain so for the foreseeable future. Consequently, the Canadian government will have to adopt policy positions on a wide range of questions that will arise as new legislation is debated and as administrators implement the various regulations. It will be important to outline alternative positions and to indicate the ramifications of each. We have seen, however, the difficulty involved in attempting to analyse the economic consequences of FIRA because of the political context within which FIRA operated. We must recognize that, in the final decision-making, the overriding force will be political judgment. The actual operation of FIRA over eleven years and the amendments to the Act proposed in 1980 by Herb Gray illustrate the point that social and political ideals and processes, rather than economic evaluations or considerations of efficiency and consistency, have been predominant.

We should note that attempts by the Canadian government to limit, direct, and place restrictions on foreign firms may be seen by other nations as treating their residents unfairly. We may expect retaliation, and we shall have to develop policy positions to cope with such future reactions by other governments. We have already noted that some aspects of our control over foreign ownership have already been judged to contravene certain GATT articles. It is quite possible that Canada may,

from time to time, face further international opposition to some of its actions in this sphere.

## SHOULD WE HAVE KEPT FIRA?

The study by Schultz et al, which focused on the cabinet's role in FDI regulation, emphasized the ambiguous and above all political nature of the FIRA process:

> Indeed many would agree with the assessment of one participant that the degree of public policy articulation, which was promised with experience, has to date been 'abysmal' ... As the majority of policy guidance is internal to the Government, the system appears to the outsider, especially the investor, as totally ad hoc ... In the eyes of many ... FIRA has institutionalized 'ad hocery' ... This aspect has serious consequences for investors who, in the words of one central participant, have 'no idea of what is expected of them other than the motherhood objectives in the Act' ... One of the central characteristics of the assessment process is a high degree of ambiguity and confusion (pp. 61-3).

A major argument in favour of maintaining some review process is that foreign investment is a political issue and so must be controlled by a political process; it is based on a set of judgments that must change as Canada changes. From this point of view, ad hoc procedures and the resulting ambiguity, though often unfair and difficult for the applicant, are a natural part of political decision-making, and, from this perspective, it is proper that the interpretation of the Act should vary as Canadians' feelings about foreign investment change.

## CONCLUDING REMARKS

In conclusion, we should emphasize the importance of a thorough review of FIRA's performance and the need for more information than is currently available in order to conduct such evaluations. One of the justifications for secrecy is the need for con-

fidentiality of the applicants' affairs. However, in other areas of the application of law to economic affairs we do not see the need for the degree of secrecy that FIRA had been given. Could we not have public hearings? Could we not improve the role of third parties in the process?

Steven Globerman, in a study cited earlier, supports the position that a thorough review of FIRA is needed: 'At the least, a case would appear to exist for undertaking a comprehensive evaluation of the review process. Such an evaluation should involve placing heretofore confidential information at the disposal of conscientious researchers' (1979, p. 96).

Possibly a royal commission would provide the most appropriate context for the compiling and analysing of 'heretofore confidential information' relating to FIRA. A royal commission would also be in a position to examine issues dealing with possible improvements in the administration of the Act as it currently exists.

# Appendix 1

Data from FIRA annual reports 1974-85

TABLE 1

Reviewable acquisition cases: acquirees classified by province of principal location and applicants by country of apparent control (%)

| Distribution of Cases | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *U.S. Applicants* | 62.7 | 67.4 | 64.5 | 69.6 | 65.1 | 60.5 | 63.6 | 58.0 | 63.7 | 67.9 | 70.9 |
| Atlantic Provinces | 3.2 | 3.1 | 2.5 | 3.4 | 3.3 | – | 3.8 | 3.6 | 2.2 | 1.6 | 1.5 |
| Quebec | 19.1 | 16.5 | 13.3 | 13.9 | 16.5 | 15.7 | 11.9 | 10.2 | 11.0 | 15.7 | 14.9 |
| Ontario | 44.7 | 51.7 | 59.2 | 62.5 | 55.1 | 61.3 | 57.2 | 64.8 | 64.0 | 60.7 | 63.1 |
| Western Provinces | 33.0 | 28.9 | 25.0 | 20.2 | 25.1 | 23.0 | 27.1 | 21.4 | 22.8 | 22.0 | 20.5 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *W. European Applicants* | 30.7 | 29.9 | 33.3 | 26.8 | 29.8 | 35.3 | 30.6 | 34.6 | 28.1 | 25.8 | 23.2 |
| Atlantic Provinces | 2.2 | 4.7 | – | 5.1 | 1.8 | 4.5 | 1.0 | 2.6 | 5.0 | 3.4 | 5.4 |
| Quebec | 37.0 | 25.6 | 32.3 | 18.7 | 18.9 | 17.9 | 18.8 | 27.3 | 22.5 | 21.0 | 20.0 |
| Ontario | 34.8 | 46.5 | 51.6 | 42.5 | 59.5 | 52.2 | 46.5 | 46.2 | 47.5 | 58.8 | 56.4 |
| Western Provinces | 26.0 | 23.2 | 16.1 | 33.7 | 19.8 | 25.4 | 33.7 | 23.9 | 25.0 | 16.8 | 18.2 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *All Other Applicants* | 6.6 | 2.7 | 2.2 | 3.6 | 5.1 | 4.2 | 5.8 | 7.4 | 8.2 | 6.3 | 5.9 |
| Atlantic Provinces | 10.0 | 25.0 | – | – | 5.3 | 6.2 | – | 4.0 | 2.9 | 3.5 | 3.6 |
| Quebec | 40.0 | – | 50.0 | 18.2 | 15.8 | 12.5 | 36.8 | 16.0 | 31.4 | 17.2 | 7.1 |
| Ontario | 10.0 | 25.0 | 50.0 | 27.3 | 52.6 | 62.5 | 31.6 | 44.0 | 45.7 | 51.7 | 57.2 |
| Western Provinces | 40.0 | 50.0 | – | 54.5 | 26.3 | 18.8 | 31.6 | 36.0 | 20.0 | 27.6 | 32.1 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

TABLE 2
Reviewable acquisition cases: applicants classified by country or region of apparent control and acquirees classified by assets ($000,000)

| | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| United States | 589.1 | 465.7 | 706.3 | 938.6 | 2,896.6 | 2,152.6 | 3,024.8 | 1,853.9 | 2,541.6 | 2,790.4 | 9,940.1 |
| (%) | (60.7) | (69.5) | (64.6) | (62.2) | (55.4) | (60.9) | (74.2) | (64.1) | (47.7) | (62.2) | (83.7) |
| Western Europe | 317.8 | 198.2 | 380.7 | 560.8 | 2,265.0 | 1,300.6 | 940.0 | 6,306.9[a] | 1,811.9 | 1,364.5 | 1,625.1 |
| (%) | (32.7) | (29.5) | (34.9) | (37.2) | (43.3) | (36.8) | (23.1) | (25.7) | (34.0) | (30.4) | (13.7) |
| Other | 63.9 | 6.6 | 5.6 | 9.6 | 66.7 | 79.2 | 111.5 | 295.7 | 971.2 | 333.4 | 314.2 |
| (%) | (6.6) | (1.0) | (0.5) | (0.6) | (1.3) | (2.3) | (2.7) | (10.2) | (18.3) | (7.4) | (2.6) |
| **Total** | 970.7 | 670.4 | 1,092.7 | 1,509.0 | 5,228.3 | 3,532.4 | 4,076.3 | 8,456.5 | 5,324.7 | 4,488.3 | 11,879.4 |
| (%) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) |

a One case with assets of more than $5.5 billion has been excluded from the calculations in the Western Europe percentage figure because inclusion of this amount would unduly distort the comparison among the fiscal years.

TABLE 3
Reviewable acquisition cases: applicants classified by province of principal location and assets ($000,000)

| | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Atlantic Provinces | 26.1 | 27.8 | 4.4 | 84.0 | 23.8 | 8.2 | 32.8 | 26.6 | 23.9 | 29.3 | 501.2 |
| (%) | (2.7) | (4.2) | (0.4) | (5.6) | (0.4) | (0.2) | (0.8) | (0.9) | (0.4) | (0.7) | (4.2) |
| Quebec | 222.2 | 163.8 | 353.2 | 161.8 | 1,226.3 | 431.3 | 612.3 | 383.7 | 1,100.9 | 626.1 | 466.0 |
| (%) | (22.9) | (24.4) | (32.4) | (10.7) | (23.5) | (12.2) | (15.0) | (13.3) | (20.7) | (13.9) | (3.9) |
| Ontario | 430.4 | 266.3 | 465.9 | 1,045.0 | 2,554.6 | 2,272.9 | 2,445.6 | 7,613.5[a] | 1,717.5 | 2,237.4 | 8,952.4 |
| (%) | (44.3) | (39.7) | (42.6) | (69.2) | (48.9) | (64.4) | (60.0) | (70.9) | (32.3) | (49.8) | (75.4) |
| Western Provinces | 292.1 | 212.5 | 269.2 | 218.0 | 1,423.5 | 819.9 | 985.5 | 432.6 | 2,482.4 | 1,595.7 | 1,959.8 |
| (%) | (30.1) | (31.7) | (24.6) | (14.5) | (27.2) | (23.2) | (24.2) | (14.9) | (46.6) | (35.6) | (16.5) |
| **Total** | 970.7 | 670.4 | 1,092.7 | 1,509.0 | 5,228.3 | 3,532.4 | 4,076.3 | 8,456.5 | 5,324.7 | 4,488.3 | 11,879.4 |
| (%) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) |

a One case with assets of more than $5.5 billion has been excluded from the calculations in the Ontario percentage figure because inclusion of this amount would unduly distort the comparison among the fiscal years.

TABLE 4
Reviewable acquisition cases: acquirees classified by principal industry sector

| | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Number of Cases* | | | | | | | | | | | |
| All Sectors | 150 | 144 | 186 | 299 | 373 | 380 | 330 | 338 | 427 | 461 | 474 |
| *Distribution by Number of Cases (%)* | | | | | | | | | | | |
| Mines, mineral fuels | 11.3 | 9.7 | 5.4 | 5.0 | 7.8 | 5.8 | 4.9 | 2.9 | 4.9 | 3.5 | 5.3 |
| Other resources | 3.3 | 1.4 | 1.6 | 2.4 | 0.8 | 1.0 | 1.2 | 0.6 | 0.5 | – | 0.4 |
| Manufacturing | 43.4 | 52.1 | 52.7 | 41.8 | 46.1 | 45.0 | 41.2 | 39.1 | 39.3 | 43.6 | 39.9 |
| Construction | 1.3 | 2.8 | – | 1.0 | 0.5 | 1.6 | 2.7 | 4.7 | 0.9 | 1.7 | 2.1 |
| Transportation, communication, and utilities | 5.3 | 3.5 | 4.8 | 4.0 | 1.9 | 2.9 | 2.7 | 2.7 | 4.7 | 3.5 | 3.6 |
| Wholesale and retail trade | 20.7 | 20.1 | 25.3 | 26.1 | 28.1 | 26.3 | 25.5 | 26.9 | 25.1 | 26.4 | 27.6 |
| Finance, insurance, and real estate | 10.7 | 6.9 | 4.8 | 6.3 | 3.8 | 4.8 | 6.7 | 5.3 | 6.1 | 5.0 | 4.2 |
| Community, business, and personal services | 4.0 | 3.5 | 5.4 | 13.4 | 11.0 | 12.6 | 15.1 | 17.8 | 18.5 | 16.3 | 16.9 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

TABLE 5
Reviewable acquisition cases: assets of acquirees classified by principal industry sector

| | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82[a] | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Number of Cases* | | | | | | | | | | | |
| All Sectors | 150 | 144 | 186 | 299 | 373 | 380 | 330 | 338 | 427 | 461 | 474 |
| *Distribution by Assets (%)* | | | | | | | | | | | |
| Mines, mineral fuels | 9.9 | *c* | 15.4 | 7.4 | | 11.3 | 12.5 | | | 8.0 | } 56.7 |
| Other resources | 1.7 | *c* | 1.0 | 0.3 | 24.1[b] | 0.1 | 0.1 | 4.8[b] | 20.9[b] | – | |
| Manufacturing | 41.9 | 52.7 | 45.7 | 45.3 | 31.5 | 45.9 | 42.7 | 61.0 | 47.7 | 50.3 | 21.1 |
| Construction | *c* | 1.9 | – | 0.4 | – | 0.3 | 0.8 | 2.5 | 0.2 | 2.0 | 0.3 |
| Transportation, communication, and utilities | 1.1 | 0.6 | 7.3 | 2.2 | 0.5 | 2.5 | 0.7 | 0.7 | 2.3 | 8.1 | 1.4 |
| Wholesale and retail trade | 17.5 | 12.6 | 23.4 | 14.1 | 21.3 | 13.9 | 5.0 | 11.1 | 5.2 | 14.4 | 6.3 |
| Finance, insurance, and real estate | 17.3 | 16.7 | 5.4 | 23.2 | 20.1 | 23.8 | 24.5 | 12.9 | 19.6 | 14.1 | 11.6 |
| Community, business, and personal services | *c* | 2.0 | 1.8 | 7.1 | 2.5 | 2.2 | 13.7 | 7.0 | 4.1 | 3.1 | 2.6 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| **Total Assets of Acquirees ($ million)** | 970.7 | 670.4 | 1,092.7 | 1,509.0 | 5,228.3 | 3,532.4 | 4,076.3 | 8,456.5 | 5,324.7 | 4,488.3 | 11,879.4 |

*a* One case with assets of more than $5.5 billion has been excluded from the calculations in the 'distribution by assets' section because inclusion of this amount would unduly distort the comparison among the fiscal years.
*b* The 'mines, mineral fuels' figure has been aggregated with the 'other resources' figure in this case.
*c* Asset figures excluded to preserve confidentiality.

TABLE 6
Reviewable manufacturing acquisition cases: acquirees classified by type of manufacturing

| | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Number of Cases* | | | | | | | | | | | |
| All Manufacturing | 65 | 75 | 98 | 125 | 172 | 171 | 136 | 132 | 168 | 201 | 189 |
| *Distribution of Cases (%)* | | | | | | | | | | | |
| Food and Beverages | 12.3 | 9.3 | 12.2 | 10.4 | 11.0 | 5.9 | 10.3 | 5.3 | 12.5 | 9.4 | 10.1 |
| Tobacco Products | 1.5 | 1.3 | – | – | – | – | – | – | – | 0.5 | – |
| Rubber and Plastics | 3.1 | 2.7 | 4.1 | 5.6 | 5.2 | 2.3 | 5.2 | 5.3 | 6.5 | 5.0 | 6.3 |
| Leather | 1.5 | 1.3 | 1.0 | – | 1.2 | 0.6 | – | – | 1.2 | – | 1.1 |
| Textiles | 3.1 | – | 3.1 | 3.2 | 2.9 | 2.9 | 3.0 | 2.3 | 2.4 | 2.0 | 4.8 |
| Knitting Mills | 1.5 | 1.3 | – | 0.8 | – | 1.2 | – | 1.5 | – | – | – |
| Clothing | – | 2.6 | 1.0 | – | – | 3.5 | 2.2 | 3.8 | 3.0 | 11.0 | 1.6 |
| Wood | 9.2 | 6.7 | 3.1 | 4.0 | 3.5 | 3.5 | 0.7 | 5.3 | 1.2 | 2.5 | 1.6 |
| Furniture Fixtures | – | 5.3 | 2.0 | 2.4 | 3.5 | 1.8 | 2.2 | 3.0 | 2.4 | 4.0 | 3.7 |
| Paper & Allied | 3.1 | 1.3 | 1.0 | 4.0 | 1.2 | 1.2 | 2.2 | 1.5 | 2.4 | 3.0 | 4.2 |
| Printing, Publishing & Allied | – | 4.0 | 1.0 | 4.0 | 0.6 | 3.5 | 4.4 | 3.0 | 3.0 | 2.5 | 2.6 |
| Primary Metal | – | 6.7 | 5.1 | 1.6 | 1.2 | 5.3 | 1.5 | 2.3 | 2.4 | 3.5 | 1.1 |
| Metal Fabricating | 4.6 | 9.3 | 11.2 | 10.4 | 11.0 | 15.2 | 16.2 | 12.9 | 16.7 | 11.4 | 11.6 |
| Machinery | 10.8 | 13.4 | 5.1 | 9.6 | 13.4 | 14.6 | 10.3 | 9.1 | 10.7 | 12.9 | 14.8 |
| Transportation Equipment | 13.9 | 6.7 | 3.0 | 6.4 | 8.7 | 4.1 | 6.6 | 6.1 | 5.9 | 5.0 | 8.5 |
| Electrical Products | 6.2 | 10.7 | 10.2 | 8.8 | 11.0 | 14.0 | 8.8 | 12.1 | 9.5 | 14.4 | 7.9 |
| Non-metallic minerals | 13.8 | 2.7 | 9.2 | 6.4 | 4.1 | 2.3 | 3.7 | 5.3 | 2.4 | 6.5 | 3.7 |
| Petroleum & Coal | – | – | 3.1 | – | 0.6 | 0.6 | 0.7 | – | – | 0.5 | – |
| Chemicals | 12.3 | 8.0 | 16.4 | 9.6 | 13.9 | 9.9 | 8.8 | 12.9 | 10.1 | 9.4 | 11.1 |
| Miscellaneous | 3.1 | 6.7 | 8.2 | 12.8 | 7.0 | 7.6 | 13.2 | 8.3 | 7.7 | 6.5 | 5.3 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

TABLE 7
Reviewable manufacturing acquisition cases: assets of acquirees classified by type of manufacturing

| | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *Number of Cases* | | | | | | | | | | | |
| All Manufacturing | 65 | 75 | 98 | 125 | 172 | 171 | 136 | 132 | 168 | 201 | 189 |
| *Distribution by Assets (%)* | | | | | | | | | | | |
| Food and Beverages | 5.4 | 3.9 | 9.1 | 4.7 | 16.5 | 4.0 | 22.0 | 25.6 | 5.9 | 11.4 | 21.7 |
| Tobacco Products | C | C | – | – | – | – | – | – | – | C | – |
| Rubber and Plastics | C | C | 1.3 | 6.4 | 17.1 | 0.7 | 1.4 | 3.1 | 1.7 | 2.2 | 0.7 |
| Leather | C | C | C | – | C | C | – | – | C | – | C |
| Textiles | C | – | C | C | 2.1 | 1.6 | 1.2 | 0.7 | 0.2 | 0.7 | 2.1 |
| Knitting Mills | C | C | – | C | – | C | – | C | – | – | – |
| Clothing | – | C | C | – | – | 1.0 | 0.4 | 0.6 | 0.5 | C | 1.4 |
| Wood | 12.4 | 2.7 | 4.2 | 1.3 | 0.6 | 1.3 | C | 3.1 | C | 0.9 | 1.5 |
| Furniture Fixtures | – | 1.3 | C | 0.8 | 2.8 | 0.5 | 0.3 | 0.5 | 1.0 | 1.6 | 1.3 |
| Paper & Allied | C | C | C | C | C | C | 1.5 | C | 2.0 | 13.1 | 16.8 |
| Printing, Publishing & Allied | – | 0.9 | C | 2.0 | C | 1.3 | 1.6 | 0.2 | 1.6 | 1.3 | 2.6 |
| Primary Metal | – | 17.1 | C | C | C | 4.4 | C | 2.8 | C | 1.7 | C |
| Metal Fabricating | 2.8 | 3.4 | 7.3 | 19.6 | 5.1 | 4.4 | 3.3 | 5.2 | 6.5 | 4.8 | 4.7 |
| Machinery | 8.5 | 22.1 | 12.8 | 6.7 | 8.3 | 6.7 | 7.4 | 4.7 | 4.3 | 9.0 | 13.5 |
| Transportation Equipment | 6.8 | 4.1 | 1.1 | 11.2 | 23.4 | 9.5 | 10.1 | 14.0 | 10.1 | 13.1 | 8.4 |
| Electrical Products | 18.4 | 21.5 | 14.5 | 8.2 | 5.2 | 33.8 | 14.5 | 29.1 | 8.1 | 8.3 | 4.2 |
| Non-metallic minerals | 21.6 | C | 17.5 | C | 5.7 | 0.3 | 6.3 | 1.5 | C | 9.6 | 0.9 |
| Petroleum & Coal | – | – | C | – | C | C | C | – | – | C | – |
| Chemicals | 2.2 | 4.2 | 7.9 | 7.3 | 7.8 | 10.1 | 6.2 | 5.1 | 1.9 | 13.2 | 14.4 |
| Miscellaneous | C | 2.4 | 2.9 | 7.9 | 3.1 | 3.6 | 6.1 | 2.7 | 1.9 | 4.6 | 2.8 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| **Total Assets of Manufacturing Acquirees ($ million)** | 406.4 | 353.6 | 499.2 | 683.7 | 1,645.0 | 1,621.1 | 1,740.4 | 1,765.4 | 2,539.7 | 2,259.9 | 2,539.7 |

C Asset figures excluded to preserve confidentiality.

TABLE 8
Reviewable new business cases: new businesses classified by principal type of manufacturing

| | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|
| *Number of Cases* | | | | | | | | | |
| All Manufacturing | 70 | 102 | 98 | 102 | 130 | 109 | 129 | 138 | 113 |
| *Distribution of Cases (%)* | | | | | | | | | |
| Food and Beverages | – | 9.8 | 6.1 | 9.8 | 9.3 | 3.7 | 8.5 | 8.0 | 9.7 |
| Tobacco Products | – | – | – | – | – | – | – | – | – |
| Rubber and Plastics | 5.7 | 5.9 | 6.1 | 9.8 | 3.8 | 9.2 | 6.2 | 12.3 | 4.4 |
| Leather | 1.4 | – | 1.0 | – | 0.8 | 0.9 | 0.8 | 0.7 | – |
| Textiles | 4.3 | 4.9 | 1.0 | 3.9 | 5.4 | 4.6 | 2.3 | 1.4 | 1.8 |
| Knitting Mills | – | 2.0 | – | – | – | – | – | – | – |
| Clothing | 2.9 | 2.9 | 3.1 | 2.9 | 1.5 | 3.7 | 2.3 | 3.6 | – |
| Wood | 2.9 | 3.9 | 3.1 | 4.9 | 3.8 | 0.9 | 0.8 | 2.2 | 1.8 |
| Furniture Fixtures | 4.3 | 1.0 | 2.0 | 3.9 | 6.2 | 0.9 | 0.8 | 2.2 | 3.6 |
| Paper & Allied | 1.4 | 2.0 | – | 1.0 | 2.3 | 2.8 | 6.2 | 0.7 | 1.8 |
| Printing, Publishing & Allied | – | 1.0 | 3.1 | 4.9 | 4.6 | 0.9 | 2.3 | 2.9 | 6.2 |
| Primary metal | 5.7 | 4.9 | 4.1 | 2.0 | 3.1 | 2.7 | 0.8 | 5.8 | 1.8 |
| Metal Fabricating | 11.4 | 12.7 | 9.2 | 12.7 | 14.6 | 15.6 | 15.5 | 11.6 | 8.8 |
| Machinery | 8.6 | 14.7 | 14.3 | 12.7 | 12.3 | 17.4 | 16.3 | 5.8 | 15.9 |
| Transportation Equipment | 2.9 | 4.9 | 7.1 | 2.9 | 4.6 | 2.7 | 9.3 | 8.0 | 16.8 |
| Electrical Products | 10.0 | 5.9 | 6.1 | 11.8 | 6.2 | 8.3 | 9.3 | 10.9 | 10.6 |
| Non-metallic minerals | 5.7 | 4.9 | 4.1 | 2.0 | 4.6 | 4.6 | 2.3 | 2.9 | 0.9 |
| Petroleum & Coal | – | – | – | – | 1.5 | – | 1.5 | 0.7 | 0.9 |
| Chemicals | 10.0 | 2.0 | 8.2 | 7.9 | 5.4 | 10.1 | 7.8 | 6.5 | 8.8 |
| Miscellaneous | 22.8 | 16.6 | 21.4 | 6.9 | 10.0 | 11.0 | 7.0 | 13.8 | 6.2 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *Planned Investments* ($ millions) | | | | | | | | | |
| All Manufacturing | 211.7 | 70.0 | 96.4 | 90.1 | 209.9 | 97.0 | 753.1 | 2,113.1 | 381.0 |

TABLE 9
Reviewable acquisition cases: acquirees classified by principal industry sector and applicants classified by country of apparent control (%)

| Distribution of Cases | 1974/75 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|---|
| *U.S. Applicants* | | | | | | | | | | | |
| Mines, mineral fuels and incidental services | 13.8 | 8.2 | 3.3 | 3.9 | 7.4 | 5.6 | 5.2 | 3.1 | 4.8 | 3.5 | 5.0 |
| Other resources | 3.2 | 2.1 | 1.7 | 1.4 | 0.4 | 0.9 | 1.0 | – | 0.3 | – | 0.3 |
| Manufacturing | 43.6 | 59.8 | 52.5 | 44.2 | 48.5 | 49.1 | 44.8 | 41.3 | 39.0 | 46.3 | 41.4 |
| Construction | – | 2.1 | – | 0.5 | 0.4 | 0.9 | 2.4 | 5.1 | 0.7 | 1.6 | 1.2 |
| Transportation, communication & utilities | 6.4 | 4.1 | 7.5 | 4.3 | 2.1 | 4.4 | 2.4 | 3.1 | 4.4 | 3.5 | 4.2 |
| Wholesale & retail trade | 21.3 | 17.5 | 25.0 | 26.0 | 25.1 | 21.7 | 24.3 | 26.0 | 25.7 | 25.6 | 26.5 |
| Finance, insurance & real estate | 8.5 | 2.1 | 3.3 | 4.8 | 2.1 | 2.2 | 3.3 | 3.6 | 5.2 | 2.6 | 3.0 |
| Community, business & personal services | 3.2 | 4.1 | 6.7 | 14.9 | 14.0 | 15.2 | 16.6 | 17.8 | 19.9 | 16.9 | 18.4 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *Western European Applicants* | | | | | | | | | | | |
| Mines, mineral fuels and incidental services | 8.7 | 11.6 | 9.7 | 6.3 | 9.0 | 5.2 | 4.0 | 3.4 | 5.8 | 4.2 | 5.5 |
| Other resources | 4.3 | – | 1.6 | 3.7 | 0.9 | 1.5 | 2.0 | 1.7 | 0.8 | – | 0.9 |
| Manufacturing | 37.1 | 39.5 | 53.2 | 37.5 | 44.2 | 38.8 | 37.6 | 37.6 | 39.2 | 41.2 | 35.4 |
| Construction | 4.3 | 4.7 | – | 2.5 | 0.9 | 2.2 | 4.0 | 5.1 | 1.7 | 2.5 | 5.5 |
| Transportation, communication & utilities | 4.3 | 2.3 | – | 2.5 | 1.8 | 0.7 | 0.9 | 1.7 | 5.9 | 2.5 | 1.8 |
| Wholesale & retail trade | 19.6 | 23.3 | 24.2 | 27.5 | 31.5 | 33.6 | 27.7 | 29.1 | 22.5 | 26.9 | 31.8 |
| Finance, insurance & real estate | 17.4 | 16.3 | 8.1 | 11.3 | 7.2 | 9.0 | 10.9 | 6.9 | 8.3 | 10.9 | 8.2 |
| Community, business & personal services | 4.3 | 2.3 | 3.2 | 8.7 | 4.5 | 9.0 | 12.9 | 14.5 | 15.8 | 11.8 | 10.9 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *All Other Applicants* | | | | | | | | | | | |
| Mines, mineral fuels and incidental services | – | 25.0 | – | 18.2 | 5.3 | 12.5 | 5.3 | – | 2.8 | – | 7.1 |
| Other resources | – | – | – | 9.1 | 5.2 | – | – | – | – | – | – |
| Manufacturing | 70.0 | – | 50.0 | 27.2 | 26.3 | 37.5 | 21.0 | 28.0 | 42.9 | 24.1 | 39.3 |
| Construction | – | – | – | – | – | 6.2 | – | – | – | – | – |
| Transportation, communication & utilities | – | – | – | 9.1 | – | – | 15.8 | 4.0 | 2.9 | 6.9 | 3.6 |
| Wholesale & retail trade | 20.0 | 50.0 | 50.0 | 18.2 | 47.4 | 31.3 | 26.3 | 24.0 | 28.6 | 34.5 | 25.0 |
| Finance, insurance & real estate | – | 25.0 | – | – | 5.3 | 6.3 | 21.1 | 12.0 | 5.7 | 6.9 | 3.6 |
| Community, business & personal services | 10.0 | – | – | 18.2 | 10.5 | 6.2 | 10.5 | 32.0 | 17.1 | 27.6 | 21.4 |
| Total | 10[illegible] | 10[illegible] | 1[illegible] | 1[illegible] | [illegible] | [illegible]0 | [illegible]0 | [illegible]0 | [illegible]0 | [illegible]0.0 | [illegible]0.0 |

TABLE 10
Reviewable new business cases: new businesses classified by province of principal location and applicants classified by country of apparent control (per cent)

| | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|---|
| **NUMBER OF CASES** | | | | | | | | | | |
| United States | 10 | 119 | 192 | 200 | 220 | 212 | 230 | 262 | 284 | 267 |
| Western Europe | 10 | 96 | 115 | 101 | 142 | 154 | 111 | 145 | 154 | 136 |
| All other countries | 6 | 23 | 26 | 39 | 42 | 35 | 60 | 53 | 74 | 52 |
| **Total** | 26 | 238 | 333 | 340 | 404 | 401 | 401 | 460 | 512 | 455 |
| **DISTRIBUTION OF CASES (%)** | | | | | | | | | | |
| *United States applicants* | | | | | | | | | | |
| Atlantic provinces | – | 1.7 | 1.6 | 3.5 | 2.3 | 2.4 | 1.3 | 3.8 | 6.0 | 1.5 |
| Quebec | 20.0 | 12.6 | 8.3 | 10.0 | 8.6 | 5.2 | 8.7 | 8.0 | 9.1 | 7.5 |
| Ontario | 60.0 | 64.7 | 67.7 | 59.5 | 63.6 | 64.6 | 63.5 | 67.2 | 64.1 | 68.5 |
| Western provinces | 20.0 | 21.0 | 22.4 | 27.0 | 25.5 | 27.8 | 26.5 | 21.0 | 20.8 | 22.5 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *Western European applicants* | | | | | | | | | | |
| Atlantic provinces | 20.0 | 10.4 | 12.2 | 6.0 | 5.6 | 6.5 | 2.7 | 15.2 | 16.2 | 7.3 |
| Quebec | 30.0 | 28.1 | 24.4 | 25.7 | 24.0 | 20.8 | 27.0 | 28.9 | 22.7 | 27.9 |
| Ontario | 20.0 | 48.0 | 47.8 | 48.5 | 54.9 | 53.9 | 54.1 | 40.7 | 48.1 | 53.0 |
| Western provinces | 30.0 | 13.5 | 15.6 | 19.8 | 15.5 | 18.8 | 16.2 | 15.2 | 13.0 | 11.8 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |
| *All other applicants* | | | | | | | | | | |
| Atlantic provinces | 33.3 | 8.8 | 7.7 | – | – | – | 3.3 | 5.7 | 2.7 | 5.8 |
| Quebec | 16.7 | 13.0 | 15.4 | 5.1 | 16.7 | 20.0 | 11.7 | 15.1 | 13.5 | 11.5 |
| Ontario | 33.3 | 43.4 | 53.8 | 64.1 | 59.5 | 51.4 | 45.0 | 56.6 | 56.8 | 57.7 |
| Western provinces | 16.7 | 34.8 | 23.1 | 30.8 | 23.8 | 28.6 | 40.0 | 22.6 | 27.0 | 25.0 |
| **Total** | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 | 100.0 |

TABLE 11
Reviewable new business cases: new business classified by principal industry sector and applicants classified by country of apparent control (%)

| | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|
| *U.S. Applicants* (number) | 119 | 192 | 200 | 220 | 212 | 230 | 262 | 284 | 267 |
| Mines, mineral fuels and incidental services | 3.4 | 5.2 | 6.0 | 4.5 | 6.6 | 2.6 | 1.9 | 4.6 | 1.8 |
| Other resources | 1.7 | 1.6 | 1.0 | 1.4 | 0.5 | – | – | – | 0.4 |
| Manufacturing | 23.5 | 27.6 | 27.5 | 23.6 | 32.1 | 26.5 | 29.4 | 28.5 | 27.0 |
| Construction | 2.5 | 2.6 | 5.5 | 2.7 | 2.8 | 6.5 | 2.7 | 1.4 | 1.9 |
| Transportation, communication & utilities | 5.9 | 1.0 | 2.0 | 2.7 | 0.9 | 3.9 | 1.2 | 3.5 | 2.6 |
| Wholesale & retail trade | 42.8 | 37.0 | 32.5 | 39.1 | 32.1 | 33.1 | 36.6 | 34.5 | 35.2 |
| Finance, insurance & real estate | 4.2 | 2.6 | 4.0 | 1.9 | 0.9 | 1.7 | 3.8 | 1.8 | 2.6 |
| Community, business & personal services | 16.0 | 22.4 | 21.5 | 24.1 | 24.1 | 25.7 | 24.4 | 25.7 | 28.5 |
| *Western European Applicants* (number) | 96 | 115 | 101 | 142 | 154 | 111 | 145 | 154 | 136 |
| Mines, mineral fuels and incidental services | 7.3 | 7.0 | 7.9 | 5.6 | 9.7 | 3.6 | 2.7 | 2.6 | 3.7 |
| Other resources | 1.0 | 4.3 | – | 1.4 | 2.6 | 1.8 | 1.4 | 1.3 | 0.7 |
| Manufacturing | 37.5 | 37.4 | 37.6 | 30.3 | 33.1 | 33.3 | 26.9 | 26.6 | 23.5 |
| Construction | 1.0 | 0.9 | 4.0 | 2.8 | 4.6 | 4.5 | 4.1 | 3.2 | 5.1 |
| Transportation, communication & utilities | 3.1 | 1.7 | 4.0 | 2.8 | 1.9 | 4.5 | 3.5 | 3.2 | 1.5 |
| Wholesale & retail trade | 39.7 | 28.7 | 26.7 | 37.3 | 33.8 | 37.0 | 38.6 | 40.3 | 47.8 |
| Finance, insurance & real estate | 39.7 | 28.7 | 26.7 | 37.9 | 4.6 | 0.9 | 2.8 | 3.9 | 1.5 |
| Community, business & personal services | 3.1 | 13.0 | 15.8 | 15.5 | 9.7 | 14.4 | 20.0 | 18.9 | 16.2 |
| *All Other Applicants* (number) | 23 | 26 | 39 | 42 | 35 | 60 | 53 | 74 | 52 |
| Mines, mineral fuels and incidental services | 4.4 | – | 7.7 | 2.4 | 5.7 | 1.6 | 5.7 | 2.7 | 3.9 |
| Other resources | – | 3.9 | – | – | 2.9 | 1.7 | – | – | – |
| Manufacturing | 26.1 | 23.0 | 12.8 | 16.7 | 31.4 | 18.3 | 24.5 | 21.6 | 17.3 |
| Construction | – | – | – | – | – | – | 1.9 | 1.3 | 1.9 |
| Transportation, communication & utilities | 4.3 | 3.9 | 10.3 | 4.7 | – | 1.7 | – | 6.8 | 9.6 |
| Wholesale & retail trade | 39.1 | 42.3 | 48.7 | 59.5 | 45.7 | 56.7 | 49.0 | 48.6 | 48.1 |
| Finance, insurance & real estate | 8.7 | – | 7.7 | 2.4 | – | 5.0 | 3.8 | 4.1 | 1.9 |
| Community, business & personal services | 17.4 | 26.9 | 12.8 | 14.3 | 14.3 | 15.0 | 15.1 | 14.9 | 17.3 |

TABLE 12
Reviewable new business cases: new business classified by province of principal location and planned investment ($000,000)

| | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|
| Atlantic Provinces | 10.4 | 31.9 | 9.6 | 7.2 | 409.5 | 4.0 | 82.0 | 38.6 | 47.7 |
| (%) | (3.0) | (19.8) | (2.7) | (2.6) | (32.2) | (0.6) | (2.4) | (1.4) | (5.8) |
| Quebec | 120.1 | 19.8 | 52.8 | 47.5 | 87.3 | 60.3 | 82.6 | 1,898.1[a] | 167.8 |
| (%) | (34.2) | (12.2) | (14.9) | (17.0) | (6.9) | (8.6) | (2.4) | (69.1) | (20.5) |
| Ontario | 108.8 | 43.7 | 57.2 | 105.0 | 173.8 | 207.9 | 177.6 | 583.5 | 346.2 |
| (%) | (31.0) | (27.1) | (16.1) | (37.6) | (13.7) | (29.5) | (5.1) | (21.2) | (42.2) |
| Western Provinces | 111.4 | 66.0 | 235.5 | 119.8 | 600.7 | 432.0 | 3,105.8 | 229.0 | 258.4 |
| (%) | (31.8) | (40.9) | (66.3) | (42.8) | (47.2) | (61.3) | (90.1) | (8.3) | (31.5) |
| **Total** | 350.7 | 161.4 | 355.0 | 279.5 | 1,271.2 | 704.2 | 3,448.0 | 2,749.2 | 820.0 |
| (%) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) |

*a* The Quebec figure includes major French investment proposals in primary metals

TABLE 13
Reviewable new business cases: applicants classified by country or region of apparent control and planned investment ($000,000)

| | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 |
|---|---|---|---|---|---|---|---|---|---|
| United States | 134.5 | 58.8 | 217.0 | 98.6 | 373.9 | 137.8 | 260.9 | 490.7 | 440.6 |
| (%) | (38.4) | (36.5) | (61.2) | (35.3) | (29.4) | (19.6) | (7.6) | (17.8) | (53.7) |
| Western Europe | 202.1 | 98.5 | 131.1 | 113.4 | 608.9 | 214.9 | 650.0 | 2,089.3 | 341.2 |
| (%) | (57.6) | (61.0) | (36.9) | (40.6) | (47.9) | (30.5) | (18.8) | (76.0) | (41.6) |
| Other | 14.0 | 4.1 | 6.7 | 67.5 | 288.5 | 351.5 | 2,537.1 | 169.1 | 38.2 |
| (%) | (4.0) | (2.5) | (1.9) | (24.1) | (22.7) | (49.9) | (73.6) | (6.2) | (4.7) |
| **Total** | 350.7 | 161.4 | 355.0 | 279.5 | 1,271.2 | 704.2 | 3,448.0 | 2,749.2 | 820.0 |
| (%) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) | (100.0) |

TABLE 14
Reviewable acquisition cases: number of cases classified by applicants' region or country of apparent control

| | U.S. | | W. European | | Other | | Total | |
|---|---|---|---|---|---|---|---|---|
| | No. | % | No. | % | No. | % | No. | % |
| 1974/75 | 94 | 62.7 | 46 | 30.7 | 10 | 6.6 | 150 | 100.0 |
| 1975/76 | 97 | 67.4 | 43 | 29.9 | 4 | 2.7 | 144 | 100.0 |
| 1976/77 | 120 | 64.5 | 62 | 33.3 | 4 | 2.2 | 186 | 100.0 |
| 1977/78 | 208 | 69.6 | 80 | 26.8 | 11 | 3.6 | 299 | 100.0 |
| 1978/79 | 243 | 65.1 | 111 | 29.8 | 19 | 5.1 | 373 | 100.0 |
| 1979/80 | 230 | 60.5 | 134 | 35.3 | 16 | 4.2 | 380 | 100.0 |
| 1980/81 | 210 | 63.6 | 101 | 30.6 | 19 | 5.8 | 330 | 100.0 |
| 1981/82 | 196 | 58.0 | 117 | 34.6 | 25 | 7.4 | 338 | 100.0 |
| 1982/83 | 272 | 63.7 | 120 | 28.1 | 35 | 8.2 | 427 | 100.0 |
| 1983/84 | 313 | 67.9 | 119 | 25.8 | 29 | 6.3 | 461 | 100.0 |
| 1984/85 | 336 | 70.9 | 110 | 23.2 | 28 | 5.9 | 474 | 100.0 |
| **Total** 1974/75–1984/85 | 2,319 | 65.1 | 1,043 | 29.3 | 200 | 5.6 | 3,562 | 100.0 |

NOTE: Reviewable cases include ones that have not yet been allowed, disallowed, or withdrawn.

TABLE 15
Number of reviewable new-business cases by applicants' country or region of apparent control

| | U.S. | | W. European | | Other | | Total | |
|---|---|---|---|---|---|---|---|---|
| | No. | % | No. | % | No. | % | No. | % |
| 1975/76 | 10 | 38.5 | 10 | 38.5 | 6 | 23.0 | 26 | 100.0 |
| 1976/77 | 119 | 50.0 | 96 | 40.3 | 23 | 9.7 | 238 | 100.0 |
| 1977/78 | 192 | 57.7 | 115 | 34.5 | 26 | 7.8 | 333 | 100.0 |
| 1978/79 | 200 | 58.8 | 101 | 29.7 | 39 | 11.5 | 340 | 100.0 |
| 1979/80 | 220 | 54.5 | 142 | 35.1 | 42 | 10.4 | 404 | 100.0 |
| 1980/81 | 212 | 52.9 | 154 | 38.4 | 35 | 8.7 | 401 | 100.0 |
| 1981/82 | 230 | 57.3 | 111 | 27.7 | 60 | 15.0 | 401 | 100.0 |
| 1982/83 | 262 | 57.0 | 145 | 31.5 | 53 | 11.5 | 460 | 100.0 |
| 1983/84 | 284 | 55.5 | 154 | 30.1 | 74 | 14.4 | 512 | 100.0 |
| 1984/85 | 267 | 58.7 | 136 | 29.9 | 52 | 11.4 | 455 | 100.0 |
| **Total** 1975/76–1984/85 | 1,996 | 55.9 | 1,164 | 32.6 | 410 | 11.5 | 3,570 | 100.0 |

TABLE 16
Resolved cases, 1974/75–192/83

| | 1974 April 9 – Dec. 31 | 1975/76 | 1976/77 | 1977/78 | 1978/79 | 1979/80 | 1980/81 | 1981/82 | 1982/83 | 1983/84 | 1984/85 | TOTAL |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| *Acquisitions* | | | | | | | | | | | | |
| Allowed | 33 | 116 | 124 | 231 | 282 | 320 | 215 | 248 | 469 | 430 | 464 | 3,020 |
| Disallowed | 8 | 21 | 19 | 12 | 28 | 24 | 36 | 36 | 13 | 5 | 4 | 213 |
| Withdrawn | 9 | 27 | 17 | 10 | 17 | 28 | 42 | 30 | 36 | 33 | 26 | 279 |
| **Total** | 50 | 164 | 160 | 253 | 327 | 372 | 293 | 314 | 518 | 468 | 494 | 3,512 |
| *New businesses*[a] | | | | | | | | | | | | |
| Allowed | – | – | 115 | 297 | 273 | 322 | 233 | 265 | 455 | 428 | 474 | 2,961 |
| Disallowed | – | – | 9 | 12 | 21 | 22 | 27 | 45 | 47 | 22 | 6 | 222 |
| Withdrawn | – | – | 20 | 25 | 25 | 28 | 33 | 95 | 59 | 43 | 27 | 358 |
| **Total** | – | – | 144 | 334 | 319 | 372 | 293 | 405 | 561 | 493 | 507 | 3,541 |
| *All cases* | | | | | | | | | | | | |
| Allowed | 33 | 116 | 239 | 528 | 555 | 642 | 448 | 513 | 924 | 858 | 938 | 5,981 |
| Disallowed | 8 | 21 | 28 | 24 | 49 | 46 | 63 | 81 | 60 | 27 | 10 | 435 |
| Withdrawn | 9 | 27 | 37 | 35 | 42 | 56 | 75 | 125 | 95 | 76 | 53 | 637 |
| **Total** | 50 | 164 | 304 | 587 | 646 | 744 | 586 | 719 | 1,079 | 961 | 1,001 | 7,053 |

*a* New-business provisions of the Act did not come into force until October 1975. While some cases were submitted in the calendar year 1975, none of these cases were resolved in that year.

# Appendix 2

Federal and Ontario legislation affecting FDI

The following data have been compiled for the most part from Hayden, Burns, and Kaufman (1984). Page references apply to that text unless otherwise noted.

FEDERAL LEGISLATION

*The Bank Act:* At least one-half of the directors of a foreign bank subsidiary, and three-quarters of the directors of any other bank, must be Canadian citizens ordinarily resident in Canada (p. 60106). The average outstanding total domestic assets for all foreign bank subsidiaries may not exceed 8 per cent (recently increased to 16 per cent) of the total domestic assets of all banks in Canada. The percentage of registered shares held in total by non-residents cannot increase beyond the current percentage or 25 per cent, and the percentage for a single non-resident cannot increase beyond the current percentage or 10 per cent. The Governor-in-Council is required to approve the commencement and carrying on of the business of banking by a bank that is a foreign bank subsidiary (pp. 60, 102). The Minister then issues a licence that is not longer than one year (p. 60102). This is how a Schedule B bank is created.

*The Broadcasting Act:* Broadcasting licences may not be granted to persons who are not Canadian citizens, or to non-eligible (i.e. foreign or foreign-controlled) corporations, or to governments of other countries. For a Canadian corporation to be

eligible for a licence its chairman and each of its directors must be Canadian citizens. Four-fifths of its shares must be owned by Canadian citizens or by Canadian-controlled corporations as defined by the Act (p. 60303).

*The Canada Business Corporations Act:* A majority of the directors or a committee of directors of a federally incorporated company must be resident Canadians (p. 60401). No business may be transacted at a directors' meeting (with the exception of certain holding companies) unless a majority of the directors present are resident Canadians (p. 60402).

*The Canada Development Corporation Act:* all the directors of the CDC must be Canadian citizens. A majority of the directors must also be resident in Canada. Ownership of the voting shares must be in the hands of either Canadian citizens or Canadian residents (p. 60503).

*The Canadian and British Insurance Companies Act:* The majority of directors of a federally incorporated insurance company must be Canadian citizens ordinarily resident in Canada. Shareholdings by non-residents are limited as in the Bank Act (pp. 61, 106).

*The Loan Companies Act:* At least three-quarters of the directors of a federally incorporated loan company must be Canadian citizens ordinarily resident in Canada. Shareholdings by non-residents are limited as in the Bank Act (pp. 61, 301).

*The National Energy Program:* Petroleum Incentives Grants designed to encourage Canadian owned and controlled firms to explore; reservation of a 25 per cent interest

in Canada Lands for the Crown; and a requirement that the overall average Canadian ownership of a producing field in the Canada Lands be 50 per cent (Energy Mines and Resources Canada, 1982, p. 46).

*The Trust Companies Act:* At least three-quarters of the directors of a federally incorporated trust company must be Canadian citizens ordinarily resident in Canada. Shareholdings by non-residents are limited as in the Bank Act (p. 62901).

*Territorial Lands Act:* The Canada Oil and Gas Land Regulations provide that oil and gas leases in the Yukon and Northwest Territories may only be granted to a Canadian citizen, or to a Canadian corporation whose shares are either at least 50 per cent owned by Canadians or listed on a Canadian stock exchange, or to a Canadian corporation wholly owned by such a corporation (p. 61700). The Canada Mining Regulations also restrict the granting of mining leases in the Northwest Territories in an identical manner as oil and gas leases (p. 61501).

ONTARIO LEGISLATION

*The Business Corporations Act:* A majority of the board of directors and of the executive committee of a company incorporated in Ontario must be resident Canadians (p. 76101).

*The Collection Agencies Act:* an individual may not carry on business in Ontario as a collection agency unless that individual is a resident of Canada ... A corporation may not carry on business in Ontario as a collection agency if 25 per cent of its issued and outstanding equity shares are held directly or indirectly by non-residents; if more than 10 per cent of the ... shares ... is owned ... by a non-resident ...; or if a corporation

is not incorporated under an act of the Province of Ontario, Canada or any other province in Canada (p. 7615).

*The Employment Agencies Act:* An applicant for a licence ... must have a permanent place of business in Ontario (p. 76201).

*The Insurance Act:* no licence shall be issued to a corporation ... if the majority of its issued and outstanding shares carrying voting rights are owned by a non-resident of Canada, unless the corporation was so licenced as of April 27, 1972. An agent's licence, other than a licence of life insurance, shall not be issued to a corporation with a head office outside Canada, or to a foreign-incorporated corporation (p. 76250).

*The Liquor Licence Act:* An applicant for a licence ... is entitled to be issued the licence ... except where ... the applicant is not a Canadian citizen or a person ... ordinarily resident in Canada ... the applicant is a corporation and ... the majority of the members of the board of directors are not Canadian citizens or ... ordinarily resident in Canada (Liquor Licence Act, December 1983).

*The Loan and Trust Corporation Act:* a majority of the board of directors of such corporations must be Canadian citizens ordinarily resident in Canada (p. 76451).

*The Mortgage Brokers Act:* The restrictions we listed under the Collection Agencies Act are identical to this Act's restrictions (p. 76501).

*The Non-Residential Agricultural Land Interests Registration Act:* non-resident persons and non-resident corporations owning or acquiring an interest in ten or more

hectares of agricultural land ... are required to file a registration report with the government of Ontario (p. 76511).

*The Ontario Energy Corporation Act:* a majority of the members of the board of the Ontario Energy Corporation must at all times be resident Canadians ... as defined in the Business Corporations Act of Ontario (p. 76521). Shareholdings are also restricted.

*The Ontario Securities Act:* the Director of the Ontario Securities Commission may refuse a person if he has not been a resident of Canada at least one year immediately prior to his date of application ... the Director may refuse registration to a company or partnership unless every officer and director, or every partner complies with the requirements for individual registrants as discussed above (p. 76700).

*The Ontario Transportation Development Corporation Act:* a majority of the members of the board of directors ... must be individuals who are Canadian citizens or ... who are ordinarily resident in Canada. ... a non-resident person or a corporation controlled by non-residents shall not hold equity shares ... in excess of 10 per cent of the total issued and outstanding ... shares (p. 76531).

*The Paperback and Periodical Distributors Act:* Distributors of periodicals and paperback publications must be ordinarily resident in Canada (p. 76551).

*The Public Lands Act:* prohibit[s] the sale of summer resort locations on Crown land to any person not resident in Canada or to any corporation whose head office is not in Canada (p. 76601).

# Appendix 3

Excerpts of notes by the Honourable Herb Gray in response to the brief on the Foreign Investment Review Act prepared by the Foreign Investment Review Committee of the Canadian Bar Association.

NOTES

On a Brief on the Foreign Investment Review Act
prepared by the Committee on Foreign Investment Review of
the Canadian Bar Association and published on September 24, 1981

PART I

The brief opens with a historical statement and concludes with a recommendation that the Act, Regulations and Guidelines be subjected to a comprehensive review with a view to their amendment as necessary. This part of the Brief contains a number of assertions that require responses.

Page

4 BRIEF

'An official of the Japanese foreign affairs ministry, Masao Kawai, told Canadian reporters visiting Japan that the Foreign Investment Review Agency is discouraging Japanese investment in Canada. He said Japanese businessmen are sufficiently baffled by FIRA in its present form and that FIRA delays decisions without reason and creates "much uncertainty".'

RESPONSE

Most Japanese businessmen, especially those with large and even medium-sized companies, are well aware of the fact that many countries (including of course Japan itself) screen incoming foreign investment in one way or another. Canada's review process is far more open and more clearly defined than the processes applied by other countries which screen incoming investment.

PART II

13 BRIEF

'While it would be preferable if the significant benefit criteria could be more objective, the CBA concluded that the test must remain a subjective one to

permit flexibility in the administration of the Act and in the implementation of government policy.'

RESPONSE

In the very next paragraph the CBA complains that 'The subjectivity which ensures flexibility creates a level of uncertainty for investors' and 'The criteria for decision-making have not been fully articulated.'

13 BRIEF

'The criteria' (for assessing benefits and costs) 'do not apply to all industry sectors evenly. For example, the factors have a much broader application to the manufacturing and natural resource sectors than to service sectors.'

RESPONSE

It is obvious that some of the criteria listed in subsection 2(2) of the Act may have more relevance to proposals in certain sectors than in others. For example, in some sectors there is limited scope for certain types of benefits; for instance research and development in retailing. In others, specific policies, like the NEP, may apply or have the effect of making a particular criterion more important. These differences certainly exist, but their existence does not preclude a balanced and reasonable application of the criteria to specific investment proposals in any sector.

14-15 BRIEF

In speaking about the need for the government to amplify the assessment criteria of the FIR Act the Committee cites as an example the need to explain how the 'Canadian participation' criterion, paragraph 2(2)(b), is applied. The brief notes, 'We have learned that it includes

(a) Canadian management,
(b) Canadian directors,
(c) Canadian officers,
(d) Canadian employees and
(e) Canadian equity. While one can appreciate an interpretation of the phrase involving items (a) to (d), the Canadian equity issue, while not readily apparent, if often one of the most important factors in assessing

many cases. No one knows exactly what is meant by Canadian equity, a phrase that does not appear anywhere in the Act, the Guidelines or the Regulations.'

RESPONSE

The Agency's and the Government's application of the 'Canadian participation' factor set out in the Act has been described fully and at length in several of the Agency's Annual Reports, in various public statements, and most especially in the Supplement to the Agency's 1978-79 Annual Report. The latter provided a fairly detailed description of the variety of ways in which investors have offered Canadian equity undertakings. The importance the Government attaches to Canadian ownership in some sectors, notably the resource and cultural sectors, is or should be well known. And, as the brief notes, the matter is covered in the 'New Principles of International Business Conduct' which include the following statement: 'Foreign-controlled firms in Canada should:
9. Create a financial structure that provides an opportunity for substantial equity participation in the Canadian enterprise by the Canadian public.'

69 BRIEF

The brief returns to this point at page 69 '. . . the Government and the Review Agency have seized upon the words "Canadian participation" in section 2(2)(d) (sic) of the Act and paragraph 9 of the New Principles of International Business Conduct to require, in many cases almost as a condition precedent to Order-in-Council approval, the giving of a written contractual undertaking to make equity available to the Canadian public by substantial foreign-controlled firms seeking to expand in Canada. In many cases the use of this technique has been arbitrary and inflexible.' These points are reiterated in Appendix 'D' of the brief.

RESPONSE

The government does not require written undertakings from investors. The Committee therefore, appears to be questioning the propriety of accepting equity undertakings, although Appendix 'D' to the Committee's brief quotes passages from the Gray Report which clearly envisaged that the Review

Agency would take into account Canadian equity participation as appropriate.

The statement that equity undertakings are virtually a condition precedent to allowance in a high proportion of cases is not correct. By way of example, in the past 12 months equity undertakings applied to *less than one in six* of all allowed cases.

15 BRIEF

'The statutory criteria do not take into account indirect benefits which may constitute an integral part of a takeover.'

RESPONSE

This statement is not correct. The assessment of all foreign investment proposals takes into account, to the extent that they are identifiable, all benefits to Canada likely to ensue, be they direct or indirect.

15 BRIEF

'The criteria do not permit the Review Agency to take into account the past performance of the applicant.'

RESPONSE

This statement is not correct. In deciding whether to allow or to disallow a proposal under the FIR Act, the Government must make a judgement as to the likelihood that significant benefit to Canada will result from that proposal. In so doing, each proposal must be judged on its own merits. Some investors offer more concrete plans or undertakings than do others and some rely on a combination of plans, undertakings and evidence of past performance where such evidence exists and is relevant to the assessment of the proposal that is under review. At the same time, it must be made clear that an investment proposal which does not by itself promise significant benefit to Canada will not be allowed by the Government regardless of the past performance in this country of the applicant. This is in accordance with the requirements of the Act.

15-16 BRIEF

'The legislation does not appear to permit the Review Agency to take into account the New Principles of International Business Conduct in measuring significant benefit (and indeed this is the Review Agency's position).'

RESPONSE

This statement is not correct. When the Honourable Alastair Gillespie tabled the 'New Principles' in Parliament in 1975 he said that they would 'provide an added indication of the sort of benefits the Government looks for in assessing investment proposals under the FIR Act'. The 'New Principles' themselves are reproduced in full in the Agency's publication 'Businessman's Guide to the Foreign Investment Review Act' and their relevance is carefully explained. Investors who seek guidance from the Agency as to how to frame their proposals are regularly referred to the 'New Principles' as one key indicator of what the Government expects of foreign-controlled firms operating in Canada. However, as explained above, benefit to Canada can only be assessed as it is realized *as a result of* an investment proposal that is under review.

17 BRIEF

'The significant benefit test does not allow the Review Agency to take into consideration undertakings given by an applicant in connection with a previous application. This has the effect of encouraging applicants to "hold back" commitments so as to "save something" for the next time and the significant benefit test is administered on a basis which requires an applicant to demonstrate incremental benefits each time it is subject to review.'

RESPONSE

What the Committee seems to be advocating is that commitments given in connection with one previously allowed reviewable transaction, e.g. the takeover of one Canadian business, should be 'double-counted' so as to apply subsequently to a second, third or fourth takeover by the same applicant. The Act clearly does not allow this and it would be wholly inconsistent with the thrust and purpose of the Act to apply it in the manner suggested. As a

point of clarification, it is not the applicant as such which is subjected to review but rather the transaction.

18 BRIEF

'We have also learned that in practice the significant benefit criteria are interpreted differently depending upon the geographical location of the business under review.'

RESPONSE

This is true, (and it should come as no surprise) because proposals which are otherwise identical but relate to different regions of the country can give rise to different levels of benefits. For example, *all other things being equal*, more benefit would be attributable to a proposal to create a certain number of jobs in a region of the country experiencing high unemployment than to a proposal to create the same number of jobs in a region where that problem is less severe; or to a proposal which promises to provide a service in a part of the country where it is currently lacking compared to one in which that service is readily available. To interpret the criteria in any other way would be quite unrealistic, since it would be, in effect, a denial of the regional diversities within Canada.

19 BRIEF

'While we have concluded, on balance, that the significant benefit test in the Act must remain subjective, the CBA strongly recommends that the Government review and, if necessary, revise the criteria in section 2(2) of the Act. More significantly, we urge the Government, through the Review Agency, to issue guidelines on a regular industry sector basis to indicate the manner in which the Cabinet or the Review Agency is interpreting the significant benefit criteria in the light of changing economic conditions and Government policy.'

RESPONSE

If the CBA has any specific suggestions as to how the criteria of the FIR Act should be revised, the Government would be pleased to receive them.

There may be some merit in the Committee's suggestion for the issuance of 'guidelines on a regular industry sector basis to indicate the manner in which the Cabinet or Review Agency is interpreting the significant benefit criteria in the light of changing economic conditions and Government policy'. But, it appears to reflect an over-simplified view of the economy and of the assessment process itself. Sector guidelines could not possibly deal with all the many variables that come into play as between different proposals, even within the same industry sector, e.g., the state of a business that is being acquired, the impact on competition, the impact on technological advancement etc.

19 BRIEF

'In assessing significant benefit the Review Agency should be required to consider a company's performance under the "Principles of International Business Conduct".'

RESPONSE

The Committee apparently is recommending that the Government should go further than it already does in this regard (as described in the above response to page 15 of the Brief). If so it would seem that the recommendation would require the Government to carry out a performance review program of ongoing activities of existing foreign controlled companies (of the sort which the Committee opposes later in the brief [Part IV]).

21 BRIEF

'The ten day time period in which the short form of notice is to be assessed does not commence until the Review Agency is satisfied that the notice is complete. This has resulted in extensive delays in some cases. While many of the delays are attributable to incomplete notices, some applicants believe the Review Agency abuses the fact that the time periods do not commence until the Review Agency formally acknowledges receipt of a notice.'

RESPONSE

This statement is not correct. The ten-day period begins once a complete short form of notice has been filed, not when a formal receipt has been issued.

The Committee should be well aware that, by the terms of the Regulations, no other interpretation is possible.

21 BRIEF

'Applicants are often requested, after a short form of notice has been filed, to restructure their plans for the business to be acquired or established in the form of undertakings as part of the short form notice. This practice is inconsistent with the intent to expedite the review of small cases.'

RESPONSE

All proposals, large or small, must by law meet the test of significant benefit to Canada before they can be allowed. Some small business proposals, on receipt, are considered by the Minister to fall short of meeting the test. It would be convenient if all small business proposals, and the larger ones too, could be found to be of significant benefit to Canada in the form in which they are first received. Then they could all be allowed with a minimum of delay. But, this is not the case and the Minister cannot legally recommend for allowance any proposal that does not meet the test.

21-22 BRIEF

'We believe that a large percentage of all investment proposals (as high as 75%) are below the threshold levels for use of the short form of notice. This does not guarantee that this short form procedure will be followed. The statistics suggest the Review Agency has elected to require the long form of notice in a significantly high percentage of the cases thus destroying the purpose of the short form application procedure. This is especially true in applications involving a service industry, any business remotely associated with a natural resource, energy, the computer business and in circumstances where the Review Agency has decided it would be desirable to obtain the usual form letter of undertakings.'

RESPONSE

The Agency has no authority to elect 'to require the long form of notice'; that authority is vested in the Minister. The Minister, in deciding whether to recommend allowance on the basis of the short form filing or to require long

form filing, is bound by the requirement described above, i.e., that before they can be allowed, all proposals, be they large or small, must meet the test of significant benefit to Canada.

22 BRIEF

'We have learned that in some cases the provinces most affected by the FIRA application have requested a long form of notice be filed because of the Review Agency's inability to condense the application into a short telex to the provinces.'

RESPONSE

This statement is not correct. The Agency has no difficulty in condensing the essentials of all proposals filed on short forms into a telex for transmission to the province or provinces affected.

24 BRIEF

'The CBA recommends that the Act be amended to provide for a pre-notification procedure similar to that contained in the US Hart-Scott-Rodino Antitrust Improvements Act of 1976. Under such a procedure, the Review Agency and any provincial government affected would have an opportunity to consider all takeovers and new business transactions so that sensitive matters would not be removed from the review process. The pre-notification procedure would apply to all new business and takeover notices below meaningful threshold levels. . . . An appropriate pre-notification period . . . would be ten days. If an applicant did not hear from the Government within the stipulated period then the application would be deemed to have been allowed.'

RESPONSE

This recommendation will be considered when the Government decides to amend the Act.

25 BRIEF

'Because these transactions (indirect acquisitions of control) almost always have very little connection to Canada, it is well recognized that applications

usually have the greatest difficulty in establishing significant benefit in cases involving indirect transfers of control and section 3(6)(h) of the Act.'

RESPONSE

The Committee's comment assumes that indirect acquisitions of control are not important to Canada ('have very little connection to Canada'). This is not correct. *Indirect* acquisitions constitute about 30 per cent of all acquisition proposals reviewed under the FIR Act and, on average, involve a change in control of businesses with assets valued at nearly two and one-half times the assets of those involved in *direct* takeover proposals. Nor is it true that applicants should have, or do have, any greater difficulty in establishing that indirect acquisition proposals are likely to be of significant benefit to Canada. The new foreign controller of a Canadian business enterprise which is involved in an indirect acquisition is in quite as good a position to examine its operations and bring new ideas to bear so as to improve them as is a foreign investor involved in a direct acquisition of control.

26 BRIEF

'If it is the Government's intention to require that a notice be filed in connection with an indirect transfer of control of a Canadian corporation resulting from the acquisition of one foreign corporation by another, then the legislation should be amended to clarify the ambiguity which now exists.'

RESPONSE

As noted by the Committee, the Government's intention that indirect acquisitions of this type should be reviewed was clearly stated by the responsible Minister when Bill C-132, the forerunner of the present Act, was introduced to Parliament. The Act has been consistently applied in this fashion. The only legal challenge, in slightly different circumstances, was by Dow Jones and the courts found in favour of the Government. In these circumstances, where the Act is quite unambiguous on the point, it hardly seems necessary to amend the Act to this end.

28-29 BRIEF

'It would appear that a notice would be required to be filed by a group consisting of eligible persons and one or more non-eligible persons where the proposed business of the group is unrelated to the business of one or more of the *eligible* participants, notwithstanding that the proposed business is related to or the same as the business of the non-eligible participants. This seems inappropriate, and should be altered.'

RESPONSE

This statement is not correct. The Act has never been interpreted or applied in this manner.

29-30-

31 BRIEF

'The CBA recommends that these interpretation problems be rectified by amendments to the legislation. The Government should seek to clarify all future interpretation problems by adopting a policy of issuing interpretation bulletins on a regular basis.'

RESPONSE

This recommendation will be considered when the Government decides to amend the Act.

31-32 BRIEF

'The Act contemplates that the review process would take approximately 60 days. . . Section 11(1) of the Act gives the Minister the power to notify an applicant of its right to make further representations. This provision effectively permits the Review Agency to prolong the review period without any further limitation . . . We believe the ability of the Review Agency to extend indefinitely the 60-day review period contemplated by the Act is a right which was intended for use in extraordinary cases.'

RESPONSE

The statement in the first sentence is erroneous. The Act contemplates simply that the investor will hear something within 60 days – either that the

proposal has been allowed or that further information etc. is required. It is the Minister who decides whether a notice should be issued under subsection 11(1). In any case where the Minister considers that the application, as first received or as supplemented by additional information provided within the 60-day period, does not show the likelihood of significant benefit to Canada, he must instruct that a notice to that effect be sent to the applicant under subsection 11(1). If, in the opinion of the Minister, sufficient information is made available in the early stages to allow the Minister to conclude that there will be significant benefit to Canada, he must recommend allowance within the 60-day period. Nevertheless, it is recognized that there has been undue delay in some instances. Often those delays are attributable to applicants and where this is so, the Government can do little if anything about the situation. For the applicant can delay his final representations if he wishes to do so and, provided the delay is not 'unreasonable', the case cannot proceed to a decision until the applicant has made his final representations. But, in some other cases delays have been caused by other reasons, such as understaffing of the Agency. Steps have been taken to ameliorate these conditions.

35 BRIEF

'The CBA recommends that the present, though unlegislated, practice of permitting the resubmission of applications be continued. This procedure should be expressly provided for in the Act and the legislation should indicate the circumstances when an application can be resubmitted.'

RESPONSE

The practice has been and is to accept a second (and third) application in relation to the investment provided that it is sufficiently different from the preceding one as to constitute a new proposal. On one or two occasions counsel for applicants have argued that a second application must be accepted even though it was, for all practical purposes, identical to the earlier one that was disallowed, e.g. identical in substance, but with a few slight changes of wording that would have no effect on the substance. Why should Parliament be asked to condone or mandate such a practice? It would require the Government to re-assess and re-consider, a second or third time,

a proposal which in virtually identical terms it had already decided was not of significant benefit to Canada. This would not be in the public interest. Nor would it be in the interest of the investor. For the Government could not arrive at any conclusion other than that the second, or third, application had again failed to show significant benefit to Canada. The investor's time and money would have been spent to no purpose.

38 BRIEF

'The CBA recommends that the Act, regulations or guidelines be amended to make it clear that the performance of undertakings are subject to economic feasibility and that the Act provide for a statutory procedure for the renegotiation by the Review Agency (in consultation with the affected province) of undertakings.'

RESPONSE

It has from the outset been made abundantly clear on behalf of the Government that the performance of undertakings is always subject to economic feasibility. Investors are free to rely on the Government's definite and explicit statement to that effect or, if they prefer, to further qualify their undertakings as they see fit. It hardly seems necessary or desirable to ask Parliament to attempt to define what form of qualification would suit all investors and all circumstances.

The power to re-negotiate undertakings should be exercised not by the Review Agency but, as at present, by the Minister, following such consultation with his colleagues as may be appropriate in any particular case. There is no obvious need to make specific statutory provision for re-negotiation. The present practice seems to be working well.

38 BRIEF

'The CBA recommends that the practice of obtaining undertakings be incorporated in the legislation as a requirement in each case and that, to expedite Review Agency consideration, proposed undertakings be required to be submitted early in the review process.'

RESPONSE

This recommendation appears to be based in part on the premise stated in the brief that 'in all long form applications a formal written agreement crystallizing an applicant's plans in terms of the significant benefit criteria is a condition precedent to Order in Council approval'. This statement is not correct. The Act makes the giving of undertakings (as opposed to the description of plans) discretionary on the part of the applicant. There seems no good reason why an applicant who does not wish to give any undertakings, or to give undertakings covering only certain aspects of its operations, should be compelled by law to go further. The Committee's recommendation would add to the costs (to the investor) of the process, something the Government is anxious to avoid.

38 BRIEF

'The Act does not recognize or provide any status to third parties who may be interested in becoming involved in the review process. The range of interest third parties include (a) other Canadian corporations who may be interested in competing with the applicant in the review process, (b) competitors, whether eligible or not, who are desirous that a new business application not succeed and (c) Canadian management or an employee group of the target company who wish to gain control.'

RESPONSE

It is true that the Act does not specifically provide for interventions by those persons listed by the Committee. Nor does it provide for representation by other 'third parties' – municipalities, unions and workers, customers, suppliers, MPs, Senators etc. But all are surely entitled, as Canadians, to make their views known to their Government about any matter of concern or interest to them and of which they have knowledge. If they do so their representations must and will be taken into account.

39 BRIEF

'The applicant is rarely advised as to the existence or plans of third party intervenors. We believe it is contrary to the principles of natural justice that an applicant not know the case it has to meet.'

RESPONSE

As the law now stands, the Government may not divulge information disclosed to it in the course of the administration of the Act. That includes information received from the applicant (including its identity) and from third parties (including their identities). If the law were changed in the sense the Committee appears to have in mind, applicants would learn about representations made by third parties; but third parties would not be able to learn anything from the Agency about the details of the investment proposal. *This* would seem like a true denial of natural justice.. Or is the Committee also recommending that all FIRA applications be published in full detail for the benefit of all those, e.g. competitors of the applicant, who might wish to make representations thereon?

39 BRIEF

'There is clear evidence that alternative Canadian buyers who have indicated an interest in an application to the Review Agency have been invited to consult further with the Review Agency.'

RESPONSE

The Agency does not solicit representations by alternative Canadian buyers or other third parties. But, when they are made the Agency invites the third party to clarify or elaborate on its representations where this is necessary in order that the nature and substance of those representations may be properly reflected in the information which goes forward, as it must, to the Minister and the Governor in Council.

PART III

41 BRIEF

'The CBA recommends that the statutory framework be amended to require the Review Agency to issue binding rulings as to the application of any aspect of legislation. We recommend that:

1. Rulings be binding upon the Minister;
2. Provision be made to ensure that rulings are issued within a reasonable period of time;
3. Rulings be subject to the accuracy of the facts presented to the Review Agency; and
4. The Review Agency publish each ruling or a summary thereof in expurgated form.'

RESPONSE

The Agency gives opinions on the application of the Act where it can reasonably do so and when there appears to be a clear need. Yet, the Act itself provides for opinions, and then only by the Minister, solely on two questions. These two questions aside, Parliament evidently intended that the Act would be a self-complying one, in the sense that the determination of reviewability or non-reviewability, being largely matters of fact, would be made by the investor (sometimes with assistance from counsel). Obviously, it is the investor who has the best access to all the relevant facts needed to determine reviewability or otherwise. Nevertheless, the Agency, despite having no statutory authority to do so and very limited resources, gives opinions on difficult reviewability issues unless the fact situation is so unclear as to make this impossible. On the other hand, the Agency resists demands for opinions in cases where the facts and the legal interpretation are or should be quite clear; where what is being sought merely amounts to a certificate of confirmation of reviewability or non-reviewability.

43 BRIEF

'In the event that the Government is not prepared to provide for the issuance of binding rules as suggested above, the CBA recommends :

1. Section 4(1) of the Act be expanded to permit the Minister to give binding opinions on any matter relating to the application of the legislation;
2. Provisions be made to ensure that binding opinions are issued within a reasonable period of time; and
3. Opinions or summaries thereof be published in expurgated form.'

RESPONSE

Formalization of the process on these lines would simply transfer to the Government a function that is, as should be, now carried out by the Canadian legal community. There would have to be a consequent increase in the resources available to the Government for this purpose.

Many or most opinions could not in practice be expurgated to the extent necessary to conceal the identity of the firm concerned without distorting the basis of fact on which the opinion was based.

43-44 BRIEF

'Non-eligible persons are not routinely provided with an indication of the Review Agency's assessment of their plans and undertaking. In many cases a disallowance order comes as a complete surprise.'

RESPONSE

It should not 'come as a complete surprise.' The Act provides that if, after reviewing an application the Minister is unable to recommend allowance, he must cause the non-eligible person to be so notified by the issuance of a notice under subsection 11(1) of the Act. He cannot recommend disallowance until this has been done and the applicant has been afforded the opportunity to make further representations and to engage in discussions with the Agency if he so desires, for the Purpose of gaining the Minister's support. Through this mechanism, which is a procedure prescribed by the Act, the investor is placed on clear notice as to the result of the Minister's initial assessment.

44 BRIEF

'Non-eligible persons express concern that they do not have an opportunity to discuss their case with the ultimate decision-making authority', and

'Applicants do not know the manner in which their case is put to the Minister.'

RESPONSE

Under the Canadian system of government, Ministers usually have to rely on appointed officials to report and set before them the facts and considerations they should take into account in making their decisions. This is not unique to FIRA; it is true also for consideration of tariff policy, sectoral policies, RDIA financing, etc. etc. And, the Minister can and does himself meet with applicants when this is considered necessary or advisable.

45 BRIEF

'The Brief makes reference throughout to the Review Agency as, generally speaking, the regulatory authority.'

RESPONSE

The Agency is in no sense a regulatory body. Its sole function is to advise and assist the Minister in the administration of the Act.

46 BRIEF

'In law, it is the Ministry of Industry, Trade and Commerce who is responsible to administer the Act and who is responsible for making the elections and decisions under the Act. However, in practice we believe the Review Agency makes many of these decisions.'

RESPONSE

This assumption is not correct. All 'elections and decisions' which by statute must be made by the Minister (and not by the Governor in Council) are in fact made by the Minister and there is no delegation of this authority.

48 BRIEF

'The CBA is also concerned with the general absence of political accountability in the form of answerability regarding the review process. The review process is not politically accountable to Canadians in any meaningful sense. Those who have been granted the power – the Cabinet and the designated Minister – have not had to give an effective specific accounting of how they performed their responsibilities.'

RESPONSE

The accountability to Parliament and to the public of the Minister, and of the Government as a whole, for the administration of the FIR Act is the same as for the other activities of the Government where commercially or personally confidential information is involved. Indeed, it is greater than in the case of some other decision-making processes where, unlike those under the FIR Act, they are carried out by semi-independent regulatory bodies. The Minister responsible for the FIR Act must submit to Parliament an Annual Report on operations under the Act and must be prepared to be questioned about them by the Commons Committee during its consideration of the estimates, by MPs at any time during Question Period, by written questions and in debate. He can be, and frequently is, questioned by members of the public. Of course much more specific information could be provided, and accountability would be broader in certain instances, if the Act did not provide that virtually all information provided by foreign investors is privileged and may not be divulged by the Minister or officials. Would the CBA wish to see the At amended to remove that protection for investors?

49 BRIEF

'The Commissioner and other representatives of the Review Agency have often been delegated' (presumably by the Minister) 'as the persons responsible to members of the Commons Finance Committee.'

RESPONSE

The use of the word 'delegated' is not correct. The selection of persons to appear as witnesses before Committees of the House is not made by the Government. Committees of the House may call upon anyone they wish to appear. The Commissioner has never appeared without the Minister other than on a specific request from the Committee to do so. It is by no means unusual for officials of government departments to appear before Parliamentary Committees without their Ministers.

50 BRIEF

'When criticism is directed at the review process, we believe it is too often directed at officials within the *Review Agency, which possesses absolutely no*

*independent decision-making capacity*, and not at the responsible authorities – Cabinet and the designated Minister.'

RESPONSE

The statement that 'the Review Agency possesses absolutely no decision-making capacity' contradicts the earlier statement by the Committee (p. 46) that 'in practice we believe the Review Agency makes many of these decisions.' The statement on page 46 is not correct. The statement on page 50 is correct.

53 BRIEF

'Businessmen and their advisors have difficulty in understanding and applying the Oil and Gas Guidelines.'

RESPONSE

As noted elsewhere in the brief there was extensive consultation with representatives of the oil and gas industry and with legal advisors to that industry before these Guidelines were framed. Everyone agreed that, while certain difficulties remained, they were probably as good as any that could be produced.

56 BRIEF

'The CBA recommends a comprehensive review of the ' (Corporate) 'Reorganization Guidelines.'

RESPONSE

The reorganization guidelines have been the object of considerable criticism from individual members of the legal community, as well as the CBA Committee. While not necessarily accepting or agreeing with these complaints, the government will examine them carefully.

58 BRIEF

'The CBA recommends that:

58 '1. Steps be taken to clearly identify and formalize the role which the provinces are to play in the review process.'

RESPONSE

The role of the provinces is clearly defined by the Act and by a letter of proposed procedures sent by the Minister then responsible for the FIR Act to his provincial counterparts. The proposals were accepted by the provinces in March 1975. The substance of the federal/provincial agreement was made public with the release in 1978 by the Federal-Provincial Relations Office of a paper entitled 'Federalism and the Regulatory Process.' It is unclear why the Committee believes that it is now necessary to 'identify and formalize' the role of the provinces in this matter, unless the Committee was not aware of the existence or the substance of the current agreement.

58 BRIEF

'2. Complete copies of all notices be sent to the provinces significantly affected by a takeover or new business.'

RESPONSE

This is the practice, and is known to be the practice, except that, as noted earlier and by agreement with the provinces, notices of small transactions are summarized in the form of a telex message so as to avoid delay and allow small cases to be dealt with expeditiously.

58 BRIEF

'3. Copies of the proposed undertakings and any subsequent documentation be sent to the provinces before they are requested for their views and objectives, enunciated or otherwise.'

RESPONSE

Copies of undertakings are sent to the province or provinces if they are received early in the assessment process. To do so with undertakings received later in the process, as the Committee seems to be recommending, would add further delay, to the prejudice of the investor. And that additional delay could hardly be justified since, by then, the province(s) would have had

ample opportunity to identify and indicate the compatibility or otherwise of the subject investment with provincial policies, as the Act envisages.

58 BRIEF

'4. Criteria should be developed by the Review Agency, acceptable to the provinces, to determine which province(s) is/are significantly affected.'

RESPONSE

Here again the Committee may not be aware that such criteria were developed and agreed with the provinces. The rule of thumb is that each province in which the investment, or part of the investment, will occur is consulted.

PART IV

RESPONSE

The Government's intentions with respect to the new measures relating to FIRA that were proposed in the last Throne Speech have now been set out in the document entitled 'Economic Development for Canada in the 1980s' issued in connection with the November 1981 Budget, as follows:

> 'For the time being, no legislative action is intended on these measures until progress on the major initiatives already undertaken by the Government has been assessed.'

With respect to the three Throne Speech commitments related to foreign investment policy, the Economic Development document makes very clear what our position is. In regard to two of those measures, that is, the publication of notices of larger takeover bids by foreign companies and the provision of loan guarantee assistance to Canadians wishing to patriate industrial assets or bid against potential foreign purchases of Canadian business enterprises, the Government has decided not to proceed for the time being until progress on the major initiatives respecting the ownership of the Canadian oil and gas industry already undertaken by the Government has been assessed. At the same time it has also been decided by the Govern-

ment – and explained in the document – that the objectives of the proposal to review the performance of large foreign firms can be more effectively realized if all large firms, including Canadian- and foreign-controlled large firms, are involved in a dialogue with the government to exchange specific information about government and corporate plans which will be helpful to the two parties in promoting the best interests of Canada's economic development. The Government plans shortly to be in a position to announce details of the process. Since the Foreign Investment Review Agency's mandate extends only to foreign corporations, it would not be appropriate for this process to be administered by the Agency, and therefore an amendment to the Act will not be required.'

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